# Petition

81-1098

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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CENTRAL INTELLIGENCE AGENCY AND
WILLIAM J. CASEY, PETITIONERS

*v.*

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION
OF WORLD CHRISTIANITY

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the courts below properly rejected the Central Intelligence Agency's claim that portions of documents that could lead a knowledgeable reader to identify confidential intelligence sources and would reveal confidential information obtained as a consequence of a liaison arrangement with a foreign intelligence or security service are exempt from disclosure under Exemptions 1 and 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(1) and (3).

2. Whether the district court complied with the requirements of the FOIA and showed appropriate deference for the constitutional responsibilities of the Executive Branch in matters of national security and foreign policy when it (a) refused to sustain the CIA's withholding of the documents on the basis of the representations in the public affidavit and document disposition index regarding the need to protect intelligence sources and a liaison relationship with a foreign intelligence or security service, and (b) rejected the CIA's offer to present *in camera* testimony to explain more fully the facts and justification for the withholding.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Central Intelligence Agency and its Director, William J. Casey, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-20a), as modified by an order of April 2, 1981 (App. C, *infra*, 23a-24a), is reported at 636 F.2d 838. The opinion and orders of the district court (Apps. F, G and H, *infra*, 29a-39a) are not reported.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 21a-22a) was entered on December 23, 1980. A petition for rehearing was denied on August 13, 1981 (Apps. D and E, *infra*, 25a-28a). On November 2, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to December 11, 1981 (App. I, *infra*, 40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND EXECUTIVE ORDER INVOLVED

Pertinent portions of the Freedom of Information Act (5 U.S.C. 552), the National Security Act of 1947 (50 U.S.C. 403(d)(3)), the Central Intelligence Agency Act of 1949 (50 U.S.C. 403g), and Exec. Order No. 12065 are reproduced in Appendix L to this petition, *infra*, 43a-47a.

## STATEMENT

1.a. On May 26, 1978, respondent filed a request with the Central Intelligence Agency (CIA) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, for all documents relating to the Holy Spirit Association for the Unification of World Christianity, Inc., otherwise known as the Unification Church (C.A. 10).[1] Construing the CIA's failure to respond within the statutory time limits as a denial of its request (see 5 U.S.C. 552(a)(6)(A)(i) and (C)), respondent then filed this action in the United States District Court for the District of Columbia on January 12, 1979 to compel the disclosure of the documents covered by its request (C.A. 2, 8).

By the time of litigation, the CIA had located approximately 100 documents that were covered by respondent's request. The CIA released a number of these documents in their entirety, but withheld parts or all of the others on one or more grounds (App. A, *infra*, 2a). On May 16,

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[1] C.A. refers to the Appendix filed in the court of appeals.

1979, the CIA filed a motion for summary judgment with respect to the portions of the documents that it had not released. The summary judgment motion was accompanied by supporting affidavits and indices describing the documents and the reasons for withholding them.

b. The six documents at issue in this petition (Nos. 3, 7, 14, 15, 20 and 21) were among 63 that originated in the CIA's Directorate of Operations. An affidavit of Robert E. Owen, the Information Review Officer for the Directorate, and a Document Disposition Index appended to the affidavit explained the basis for the withholding of the pertinent portions of these documents. The Preface to the Index made clear, however, that the CIA could not provide a complete public description and justification for the withholding of documents that must remain confidential, noting that the comments about each separate document therefore represented "an attempt to describe material withheld in as much detail as possible without defeating the purpose of withholding the information" (C.A. 38).

The Index stated that the relevant sentence in Document 15 was withheld because it contains "information acquired as a consequence of a liaison arrangement with a foreign intelligence or security service with an understanding that the information is to be kept in confidence" (C.A. 50). The relevant passages in the remaining five documents were withheld principally on the ground that they contain circumstantial information which, in combination with other information, could lead to the identification of an intelligence source [2]—including, in one case,

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[2] The pertinent portions of four of these five documents were withheld solely on this ground. The pertinent portions of pages 1-4 of Document 20, the pages of that document involved in this petition, were withheld in their entirety under Exemption 6, 5 U.S.C. 552(b)(6), which permits withholding where disclosure would result in a clearly unwarranted invasion of personal privacy. After the district court issued its order requiring the release of information that was withheld under Exemption 6 (App. F, *infra*, 35a), the CIA reviewed these four pages and concluded that they should be withheld on the additional ground that their release could lead

a foreign intelligence source (C.A. 56). Thus, the comment for each of the five documents stated, in varying language, that the relevant information contained therein was known to only a few people at the time it was acquired or has a singular content, such that its release could lead a knowledgeable reader to identify the source of the information (C.A. 42, 45, 50, 55-56, 129; see also note 2, *supra*).

Mr. Owen's affidavit explained the need for maintaining the confidentiality of information of the type contained in the six documents. Mr. Owen stated that "[c]onfidential sources of intelligence information can be expected to furnish information only so long as they feel secure in the knowledge that they are protected from retribution or embarrassment by the pledge of confidentiality that surrounds the information transaction" (C.A. 23). He further stated that "the informant may be perpetually vulnerable to discovery and retribution may be a real threat for him and his family for many years" (C.A. 24). "For these reasons," Mr. Owen stressed, "the pledge of secrecy, as a condition precedent to cooperation with American intelligence, is absolute in its terms and goes beyond a mere assurance that some discretion will be exercised before the information is released" (C.A. 24).

The Owen affidavit also explained that foreign intelligence or security services are "[s]ome of the most significant sources of foreign intelligence information" (C.A.

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to the disclosure of an intelligence source. The CIA presented this justification for withholding all of the relevant portions of the first four pages of Document 20 in its motion for partial relief from judgment, along with an accompanying supplemental affidavit and document index (C.A. 121-122, 129), but the court denied that motion without explanation (App. H, *infra*, 39a; see pages 8-9, *infra*). Thus, as the case comes before this Court, the relevant portions of all five of these documents have been withheld on the ground that their release could lead to the identification of an intelligence source.

25), particularly in areas of the world where United States citizens are not welcome or where the United States' own intelligence operations cannot operate effectively (*ibid.*). Thus, he stated that "[a]ny unauthorized release or other incident that suggested or proved to the foreign service that the CIA was unwilling or unable to provide the kind of protection that service expected its intelligence information would be provided, could cause potentially serious damage to the liaison relationship and, consequently, to United States national security interests" (*ibid.*). Mr. Owen stated that such incidents in the past have led to situations in which foreign intelligence services no longer passed secret information to the CIA and "have caused serious strains on relations between governments" (*id.* at 26).

c. On the basis of these descriptions of the documents and the consequences that could result from their release, the CIA asserted that its withholding of the relevant portions of the documents was supported by Exemptions 1 and 3 of the FOIA, 5 U.S.C. 552(b)(1) and (3).[3] Exemption 1 protects from disclosure those matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." Sections 1-301(b) and 1-301(c) of Exec. Order No. 12065 (43 Fed. Reg. 28949 (1978)) provide that confidential "foreign government information" and information concerning "intelligence activities, sources or methods" is subject to classification under that Order. Such information may be classified under the Executive Order if its unauthorized disclosure "reasonably could be expected to cause identifiable damage to the national security." Section 1-104; see also Section 1-302.[4] Section 1-303 of

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[3] But see note 2, *supra*.

[4] This is the standard for classifying information "Confidential." Section 1-104. The "Secret" and "Top Secret" classifications may be applied to information the unauthorized disclosure of which

the Executive Order further states that unauthorized disclosure of foreign government information or the identity of a confidential foreign source "is presumed to cause at least identifiable damage to the national security."

As explained in the Owen affidavit and accompanying index, all of the relevant portions of the six documents were classified, and the classified status of these six and all other documents that originated in the Directorate of Operations was reviewed under the criteria established in Exec. Order No. 12065 (C.A. 22-23, 42, 45, 50-51, 54-56, 121, 129; see also note 2, *supra*). Mr. Owen stated that after personally reviewing the material that was then properly and currently classified, he had determined that it contained information "the disclosure of which would at least cause identifiable damage to the national security interests of the United States" (C.A. 22; see also *id.* at 121-122).

Exemption 3 of the FOIA, upon which the CIA also relied in withholding the material, provides that the FOIA does not apply to matters that are specifically exempted from disclosure by another statute. The Exemption 3 statute principally relied upon by the CIA is 50 U.S.C. 403(d)(3), which provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." See C.A. 21.[5]

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reasonably could be expected to cause "serious" or "exceptionally grave" damage, respectively, to the national security. Sections 1-102 and 1-103.

[5] The CIA also relied upon 50 U.S.C. 403g, which exempts from disclosure laws information pertaining to the organization, functions, or personnel of the Agency (C.A. 21).

In addition to the documents discussed in the text, the CIA located 36 documents in its Office of Legislative Counsel that mentioned respondent. These consisted of " 'correspondence and memoranda originated by one of four congressional committees that investigated various aspects of Korean-American relations between 1976 and 1978' " (App. A, *infra*, 4a, quoting App. F, *infra*, 31a-32a). Portions of one of these documents were released with the

2. After the CIA filed its motion for summary judgment, respondent filed a cross-motion for summary judgment on June 25, 1979. The district court examined the documents *in camera*[6] and ruled on the cross-motions for summary judgment in an opinion dated July 27, 1979 (App. F, *infra*, 29a-37a). In its opinion, the district court recognized that the CIA necessarily drafted the description of the documents for inclusion in the public affidavits and

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Committee's consent (C.A. 101-102, 105-107). The CIA withheld the other 35 of these documents on the ground that they were congressional records, not "agency records" subject to the FOIA (C.A. 100-101). See 5 U.S.C. 551(1), 552(a)(3) and 552(a)(4)(B). Fifteen of the documents that originated in the Directorate of Operations (Nos. 47-61) had been prepared by the CIA in connection with those congressional investigations (App. A, *infra*, 8a-9a).

The district court held that all 35 congressionally generated documents and 11 of the 15 CIA generated documents were congressional records outside the scope of the FOIA (App. F, *infra*, 31a-34a; see also App. G, *infra*, 38a). The court of appeals reversed the district court on this point (App. A, *infra*, 4a-10a). These documents are not involved in the present petition. See note 17, *infra*.

[6] The documents were made available to the district court for examination on several different days, but, for security reasons, they were returned to the CIA at the close of each day. The documents remain in the CIA's possession at the present time.

We have been informed that the Assistant United States Attorney (AUSA) responsible for the case and an attorney from the General Counsel's Office of the CIA were present on July 17, 1979, when the documents were delivered to the court, in chambers, pursuant to a telephone request by the court. We understand that on this date, only security arrangements for the documents were discussed. We also have been informed that the AUSA and the CIA attorney were requested to return to the court on July 19, 1979, to meet with the district judge in chambers. No transcript was made of this conference. However, the AUSA and the CIA representative have informed us that the conference was relatively brief, lasting perhaps half an hour, and that during this period the CIA representative answered questions the court asked about certain documents and notations on them. Insofar as the AUSA and CIA representative can recall, the court asked no questions about the portions of the six documents that are involved in this petition.

indices in such a way as "to avoid revealing the very information it seeks to protect" (App. F, *infra*, 31a) and explained that it had examined the documents *in camera*, rather than sustaining the withholding of the documents on the basis of the public materials alone, because the CIA was "unwilling or unable for whatever reason to furnish sufficient details" (*ibid.*).

After examining the documents prepared in the Directorate of Operations—which, the court observed, consist of "reports, memoranda and letters from agents or informants" (App. F, *infra*, 34a)—the court found the CIA's representations in the public affidavit and index regarding the material covered and the particular exemptions claimed to be adequate for the most part. But the court stated that with respect to nine documents, including the six at issue in this petition, "the Agency's claims are overly broad, particularly in the area of privacy" (*id.* at 35a). The court did not address the CIA's national security concerns regarding five of the documents or request that the parties do so. Instead, the court stated that it had "corrected" the CIA's claims of exemption for all nine documents, granted respondent's motion for summary judgment with respect to the "corrected" portions of the documents, and ordered the CIA to release those portions (*id.* at 35a, 36a).

3. In response to the district court's order, the CIA released the portions of the nine documents that had been withheld on privacy grounds pursuant to Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6) (App. A, *infra*, 13a-14a). However, the CIA filed a motion for partial relief from judgment with respect to the portions of the six documents that are involved in this petition.[7] This motion was accompanied by a supplemental affidavit of Robert

[7] As we have explained (see note 2, *supra*), in reviewing the documents in response to the district court's order the CIA concluded that the relevant portions of pages 1-4 of Document 20, which initially were withheld in their entirety on privacy grounds, should be withheld in their entirety because their disclosure could lead to the identification of an intelligence source.

Owen. In that affidavit, Mr. Owen stated that he again had reviewed the six documents and related materials and concluded that the relevant passages properly were withheld under Exemptions 1 and 3 (C.A. 122).

Mr. Owen also reiterated his observation in the Preface to the original Document Disposition Index regarding the CIA's inability to explain in public affidavits and related materials the full details underlying the withholding of documents such as these (C.A. 122). Accordingly, he informed the court that the CIA was prepared to make classified testimony available, *in camera*, to provide a more complete account of the decisions the Agency had made regarding the need to withhold the material under Exemptions 1 and 3 (C.A. 124-125). He explained that a determination whether the nature of the information contained in the relevant passages could lead a knowledgeable but hostile reader to identify the source of that information "involves a judgment as to how much and which related information the hostile reader may already be aware of" (*id.* at 124). "Such matters," he continued, "are usually not evident from individual documents" (*ibid.*). He specifically informed the court that the documents at issue here "do not provide a very comprehensive or meaningful insight into the intelligence activity which produced them" and consequently "do not provide much of a feel for what is at jeopardy should the documents be disclosed" (*ibid.*).

The district court, without discussion, denied the CIA's motion for partial relief from judgment and offer to submit *in camera* testimony (App. H, *infra*, 39a).

4. The court of appeals affirmed the district court's order requiring the disclosure of the relevant portions of the six documents. In so doing, the court did not review the documents themselves [8] or address the substance of the CIA's claims of exemption or the district court's

[8] As noted above, the documents were retained by the CIA for security reasons. However, counsel for the government informed the court at oral argument that the documents would be furnished to the court of appeals if requested.

rejection of those claims on the merits. The court instead addressed only three procedural points.

First, the court held that the district court did not abuse its discretion in deciding to review the documents *in camera*, rather than granting summary judgment for the CIA on the basis of the public affidavits and indices (App. A, *infra*, 14a-16a). Second, although the court of appeals agreed with the CIA that the district court "should have indicated why it found the documents unprotected by the exemptions claimed" (*id.* at 17a) and that such an explanation "would have been helpful here" (*id.* at 16a), the court declined to reverse on this ground. In the court's view, the agency has a "less pressing" need for such an explanation than does the requester, because the agency has custody of the documents and knowledge of their contents (*id.* at 17a). Third, the court concluded that "[e]ven if an *in camera* affidavit would have been helpful and appropriate here" (*id.* at 18a), the district court did not abuse its discretion in denying the government's motion for partial relief from judgment and the CIA's offer to submit *in camera* testimony. In the court's view, "interests of judicial economy and finality" militated against the district court's acceptance of additional materials after it entered its order (*ibid.*).[9]

The CIA's petition for rehearing and suggestion for rehearing en banc were denied (Apps. D and E, *infra*, 25a-28a). Four judges dissented from the denial of rehearing en banc (App. E, *infra*, 28a), and Senior Judge Bazelon stated that he would have granted the petition for rehearing because "[t]he district court should have offered some explanation for its partial rejection of [the CIA's] national security exemption claim" (App. D, *infra*, 26a).

5. By orders dated October 23 and November 17, 1981 (Apps. J and K, *infra*, 41a, 42a), the Chief Justice stayed

[9] The court rejected respondent's argument that the district court erred in sustaining the CIA's withholding of 10 other documents that originated in the Directorate of Operations on the ground that their disclosure would endanger intelligence sources (App. A, *infra*, 11a-13a).

the execution and enforcement of the judgments of the district court and court of appeals pending the timely filing and disposition of the CIA's petition for a writ of certiorari.

## REASONS FOR GRANTING THE PETITION

The court of appeals has ordered the disclosure of classified documents that the CIA determined should be withheld on the ground that their release would damage the national security. The CIA refused to disclose these documents because they could enable a knowledgeable reader to identify confidential intelligence sources or would disclose confidential information obtained as a result of a liaison relationship with a foreign intelligence or security service. The decision below not only jeopardizes the particular intelligence sources and liaison relationship involved; it substantially undermines the ability of the CIA to assure the confidentiality of its intelligence sources generally and therefore is directly contrary to the "'compelling interest in * * * the *appearance* of confidentiality so essential to the effective operation of our foreign intelligence service.'" *Haig* v. *Agee*, No. 80-83 (June 29, 1981), slip op. 26 (emphasis added), quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980).

Congress has recognized the compelling need for maintaining the confidentiality of intelligence sources and has provided that information that might reveal such sources shall be exempt from mandatory public disclosure under the Freedom of Information Act. Such materials are protected from release under Exemption 3 of the FOIA by virtue of 50 U.S.C. 403(d)(3), which provides that the Director of Central Intelligence is responsible for "protecting intelligence sources and methods from unauthorized disclosure," and 50 U.S.C. 403g, which exempts from disclosure laws information about the organization, functions, and personnel of the CIA. Such materials also are exempt from disclosure under Exemption 1 of the FOIA, which provides that the FOIA does

not apply to materials that are specifically authorized by Executive Order of the President to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.

The CIA's public affidavits and document disposition indices were more than sufficient to sustain the withholding of the documents in question. They fully explained that release would damage the national security because it could lead to the identification of an intelligence source or disclose confidential foreign government information. The courts may not substitute their judgment on such questions of national security for that of the CIA, "with its broader understanding of what may expose classified information and confidential sources" (*Snepp* v. *United States*, *supra*, 444 U.S. at 512).

Moreover, if the district court was of the view that the CIA's public explanation and its own *in camera* review of the documents were not sufficient to sustain the claim of exemption, it was obligated to afford the CIA an opportunity to make an *in camera* submission to support its determination to withhold the documents before the court ordered the release of the information. Only then would the court be in the possession of all the relevant evidence and have the full benefit of the Agency's expertise that is essential for de novo judicial review in national security cases under the FOIA, in which Congress directed the courts to give "substantial weight" to an agency's representations concerning the details of the classified status of a disputed record. And only by following such procedures and giving the "substantial weight" to the views of the Executive that is required by *statute* can a court accord the "utmost deference" that is required by the *Constitution* to be shown to the Executive's judgment regarding the need for secrecy in the conduct of the Nation's foreign relations and national defense. See *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

The decision below departs from these principles and from the approach taken by other courts of appeals. Perhaps of greater importance, the decision below departs from the result reached in these other cases as well, for this is the first case in which any court of appeals has ordered the release of classified materials under the FOIA. Review by this Court therefore is warranted.

1. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, No. 80-83 (June 29, 1981), slip op. 26, quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964). Protection of the foreign policy of the United States likewise is "a governmental interest of great importance" (*Haig* v. *Agee*, *supra*, slip op. 26). And as this Court only recently observed, "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests" (*ibid.*).

The compelling interest in confidentiality does not, of course, apply only to the *substance* of the information obtained by the Executive in the conduct of the Nation's foreign policy and defense. The interest applies equally to the *sources* of that information. If the sources cannot be assured that their affiliation or cooperation with the CIA will remain confidential and that they will, as a result, be spared the embarrassment or retribution that may be attendant upon exposure, the Nation cannot obtain the information it so critically needs in the conduct of its defense and foreign relations.

In *Haig* v. *Agee*, *supra*, this Court noted the tragic consequences that have resulted from the identification of persons who allegedly were associated with the CIA. Slip op. 3-4 n.7. Similarly, in *Snepp* v. *United States*, *supra*, 444 U.S. at 512, the Court observed that the continued availability of intelligence sources "depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents." The Court also noted in

*Snepp* the undisputed evidence that published accounts of CIA activities had "seriously impaired the effectiveness of American intelligence operations" (*ibid.*), because a number of sources had terminated or were reluctant to continue their cooperation with the CIA, and foreign intelligence services with which the CIA conducted liaison had questioned whether they should continue to exchange information with the CIA for fear it would not remain secret. The uncontradicted affidavit of Robert Owen in this case likewise attests to the harm that can result to the Nation's intelligence operations generally from the identification of intelligence sources or the release of foreign government information (C.A. 23-27, 122-124).[10]

2.a. Congress, too, has recognized the compelling interest in maintaining the confidentiality of intelligence sources. Indeed, material that would disclose such sources is protected by two different exemptions in the FOIA itself.

First, 50 U.S.C. 403(d)(3) provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." And to implement Section 403(d)(3), Congress has provided that the CIA "shall be exempted" from the provisions of any law requiring the disclosure of the organization, functions, and information about the personnel of the Agency. 50 U.S.C. 403g. When Congress enacted the 1974 Amendments to the FOIA, it made clear that information covered by Sections 403(d)(3) and 403g is exempt from disclosure under Exemption 3. H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974); S. Rep. No. 93-854, 93d Cong., 2d Sess. 16-17 (1974). Indeed, the Conference Report stated that when classified information that is subject to court review relates to intelligence sources and methods, "the court should recognize that * * * *it shall be exempted*

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[10] See also *The Freedom of Information Act: Central Intelligence Agency Exemptions: Hearings on H.R. 5129, H.R. 7055, H.R. 7056 Before a Subcomm. of the House Comm. on Gov't Operations*, 96th Cong., 2d Sess. 26-27 (1980).

*under this law.*" H.R. Conf. Rep. No. 93-1380, *supra*, at 12 (emphasis added); see also S. Rep. No. 93-854, *supra*, at 16-17 (expressing the expectation that courts "will recognize that such information [is] inherently sensitive"). The court of appeals in this case acknowledged that information protected by 50 U.S.C. 403(d)(3) is exempt from disclosure under Exemption 3 (App. A, *infra*, 11a), and respondent did not contend otherwise.

When Congress enacted the 1974 Amendments to the FOIA, it also provided that information relating to intelligence sources and methods may be independently protected from disclosure under Exemption 1 if properly classified pursuant to Executive Order of the President. See, *e.g.*, S. Rep. No. 93-854, *supra*, at 16; H.R. Conf. Rep. No. 93-1380, *supra*, at 12; cf. *Weinberger* v. *Catholic Action of Hawaii*, No. 80-1377 (Dec. 1, 1981), slip op. 5. As explained above (see pages 5-6, *supra*), Sections 1-301 and 1-302 of Exec. Order No. 12065 provide for the classification of information concerning "intelligence activities, sources or methods" and "foreign government information" if, as occurred here (see App. F, *infra*, 30a n.1), the responsible agency official determines that unauthorized disclosure of the information "reasonably could be expected to cause at least identifiable damage to the national security."

b. In this case, it was not necessary to look beyond the Owen affidavits and the document disposition indices to support the withholding of the material at issue under Exemptions 1 and 3. The original index stated with respect to Document 15, for example, that the relevant passage contains "information acquired as a consequence of a liaison arrangement with a foreign intelligence or security service with an understanding that the information is to be kept in confidence" (C.A. 50). Thus, this passage contains "foreign government information" (see Exec. Order No. 12065, Section 6-103) the unauthorized release of which is presumed, under the Executive Order, to cause at least identifiable damage to the national security and, therefore, to be classified under

the Order (*id.* at Section 1-303). The courts did not cite any evidence in the record to contradict the CIA's assertion that the information in fact was obtained from a foreign intelligence or security service with the understanding that it would be kept confidential. Nor did they explain how they overcame the presumption established by Executive Order of the President that release of such information would cause identifiable damage to the national security. Accordingly, the relevant passage in Document 15 was properly classified under the Executive Order. Nor did respondent or the courts below suggest that the withholding of such information is not a reasonable exercise of the Director's authority under 50 U.S.C. 403(d)(3) and 403g to protect intelligence sources from unauthorized disclosure. See Owen affidavit, C.A. 25-27.

The affidavits and indices are equally clear with respect to the relevant portions of the other documents involved, which were withheld on the ground that they contain circumstantial information which, in combination with other information, could lead a knowledgeable reader to identify the source of the information. The document disposition index contains a separate narrative comment describing the basis for the CIA's determination that the specific passages involved could lead to the identification of an intelligence source. The comment for Document 21, for example, states that it contains a report based on information provided by a foreign intelligence source (C.A. 56). The comment continues (*ibid.*):

> The report describes in considerable detail various politically oriented activities being carried out in a foreign country by religious organizations and the government's reaction to them. The source's unique position is fully evident in the detailed knowledge of the subject he displays. Release of any substantial part of the report is likely to identify the source among knowledgeable readers.

This explanation plainly is more than ample to support withholding of the document in order to protect the in-

telligence source from disclosure. Indeed, it is difficult to conceive how the Agency could have been more specific without disclosing classified information. The comments for the remaining four documents similarly explained that the information was withheld because it has a unique content or because it was known to relatively few persons and therefore likewise could lead a knowledgeable reader to identify an intelligence source (C.A. 42, 45, 50, 55, 122-124, 129).

For these five documents as well, neither respondent nor the courts below offered any evidence or explanation to contradict the CIA's representations about the content of the documents or the likelihood that their release could lead to the identification of the intelligence sources. See C.A. 24-25, 122-124. Thus, the passages clearly are protected by 50 U.S.C. 403(d)(3) and exempt from disclosure under Exemption 3. Moreover, in view of Mr. Owen's uncontradicted statement that release of the documents would "at least cause identifiable damage to national security interests of the United States" (C.A. 22; see also *id.* at 122-124),[11] the documents are properly classified under Executive Order 12065 and therefore are protected from disclosure under Exemption 1 as well.

The courts of appeals uniformly have held that where the description of the documents in public affidavits and indices is sufficient to place the classified materials logically within the category of materials covered by the national security exemption claimed, and where there is no charge of bad faith or contradictory evidence in the record, the agency has satisfied its burden of proof for the withholding of the documents under the FOIA, even without the need for the presentation of *in camera* testimony or

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[11] Where the source is a confidential foreign source, as in the case of Document 21, unauthorized release is *presumed* to cause at least identifiable damage to the national security. Exec. Order No. 12065, Section 1-303. As explained in the text, nothing has been cited to rebut that presumption in this case.

inspection of the documents themselves.[12] Indeed, until this case, even the District of Columbia Circuit has consistently applied these principles.[13] Although the government did not argue in the court of appeals that the district court erred in examining the documents themselves in these circumstances, as we explain below, the Agency's affidavits and document indices retained their force even after that examination. The decision below therefore conflicts with established case law.

c. After inspecting the documents themselves, the district court did not offer any explanation for its disagreement with the CIA's representations and justification for withholding. It simply concluded that the Agency's claims were "overly broad" as to these documents and "corrected" the CIA's claims, ordering the release of the passages now at issue (App. F, *infra*, 35a).

When Congress amended the FOIA in 1974, it provided that the courts must accord "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." H.R. Conf. Rep. No. 93-1380, *supra*, at 11. Here, of course, the CIA's affidavit furnished these very details. See pages 3-4, 8-9, 15-17, *supra*. Yet, it is impossible to determine from the district court's opinion whether it gave *any*, much less *substantial*, weight to the CIA's representations that release of the informa-

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[12] See *Stein* v. *Department of Justice*, Nos. 79-1615, 79-2185, & 80-2387 (7th Cir. Oct. 19, 1981), slip op. 11-12; *Terkel* v. *Kelly*, 599 F.2d 214, 217 (7th Cir. 1979); *Bell* v. *United States*, 563 F.2d 484 (1st Cir. 1977); *Raven* v. *Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), cert. denied, 440 U.S. 980 (1979); *Maroscia* v. *Levi*, 569 F.2d 1000 (7th Cir. 1977); *DiViaio* v. *Kelley*, 571 F.2d 538 (10th Cir. 1978); cf. *Lead Industries Association* v. *OSHA*, 610 F.2d 70, 87-88 (2d Cir. 1979).

[13] *Baez* v. *Department of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980); *Lesar* v. *Department of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980); *Halperin* v. *CIA*, 629 F.2d 144, 147-149 (D.C. Cir. 1980); *Hayden* v. *NSA*, 608 F.2d 1381, 1386-1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); *Ray* v. *Turner*, 587 F.2d 1187, 1194-1195 (D.C. Cir. 1978); *Weissman* v. *CIA*, 565 F.2d 692, 696-698 (D.C. Cir. 1977). See also *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

tion could disclose an intelligence source or confidential foreign government interest in information.

It may be, for example, that the court believed that it no longer had an obligation to defer to the CIA's judgment once the court decided to review the documents themselves. But the requirement of deference applied equally after the court examined the documents, for, as Mr. Owen made clear in his supplemental affidavit, it frequently is not clear from the face of the documents themselves how or even whether the information contained therein could reveal intelligence sources. Such documents often are in summary form and do not furnish insight into the intelligence activity that produced them or how much information a potential reader might already possess and be able to draw upon in discerning the source of the information. See page 9, *supra*. For these reasons, when a judge "relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources —could have identified as harmful" (*Snepp* v. *United States*, *supra*, 444 U.S. at 512).[14] Accordingly, it plainly was inappropriate here for the district court to reject the CIA's claims of exemption simply because, in the court's own view, the claims appeared from the face of the

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[14] In determining whether certain information is or should be classified, an Executive Branch official with original classification authority must consider (1) how the information relates to the national security, (2) how much damage could be done to the national security if there were an unauthorized disclosure of such information, and (3) the probability that disclosure would result in damage to the national security. In considering these factors, an Executive Branch official must be familiar with the subject matter and context of the information and its intelligence value or significance to national security. Most particularly, such an official must draw upon his knowledge of and experience in intelligence activities to determine the possible relevance and meaning such information might have to hostile intelligence services when viewed alone or in combination with other information.

documents themselves to be "overbroad." See *Stein* v. *Department of Justice*, *supra*, slip op. 12.[15]

d. For the reasons just given, the court of appeals also plainly erred in affirming the district court's rejection of the CIA's offer to present *in camera* testimony to explain the circumstances surrounding the acquisition of the information and thereby to explain why its release could lead to the disclosure of confidential foreign government information or the identification of intelligence sources, either in itself or in combination with related information that might already be in the possession of a knowledgeable reader. The courts uniformly have held that a court first should look to public affidavits and document descriptions to determine whether withholding can be sustained on that basis. See cases cited at notes 12 and 13, *supra*. It therefore was entirely appropriate for the CIA to file a motion for summary judgment on the basis of its publicly filed materials alone. Until the court ruled on that motion, the CIA could not know that the court would regard its presentations to that point as inadequate.

Moreover, the District of Columbia Circuit consistently has cautioned against the use of *in camera* submissions except when necessary. App. A, *infra*, 18a, n.15, citing *Allen* v. *CIA*, 636 F.2d 1287, 1298 n.63 (D.C. Cir. 1980); see also *Phillippi* v. *CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Agencies, too, are reluctant to resort to *in camera*

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[15] The district court departed in another respect from the procedure for responsible de novo adjudication under the FOIA, which requires a court to explain as fully as the nature of the documents will permit its rationale for rejecting the Executive's determination that documents should be withheld in the interest of national security. Only a reasoned and careful approach can assure a reviewing court that the district court has fully considered and given appropriate weight to the agency's views. See App. D, *infra*, 26a (statement of Bazelon, J., on petition for rehearing); *Coastal States Gas Corp.* v. *Department of Energy*, 644 F.2d 969, 980 (3d Cir. 1981); *Schwartz* v. *IRS*, 511 F.2d 1303, 1307 (D.C. Cir. 1975). If it was necessary to discuss the classified material in detail, no reason appears why the district could not have placed its opinion under seal.

affidavits or testimony in a case such as this because, by elaborating upon the context of the information and the resultant danger in disclosing it, the *in camera* submission often reveals far more than the documents themselves.[16]

In addition, the CIA could not know that if the district court denied the CIA's motion for summary judgment, it would at the same time grant summary judgment in favor of respondent. The CIA's affidavits and indices candidly acknowledged, as did the courts below (App. A, *infra*, 16a; App. F, *infra*, 30a-31a), that the publicly filed materials did not present all of the information that the CIA had in its possession when it determined that release of the information could lead a knowledgeable reader to identify intelligence sources or disclose foreign government information. In these circumstances, it was manifest that, if the district court denied the CIA's motion for summary judgment based on its public submission, the CIA almost surely would wish to make an additional showing *in camera* before the court ordered the release of the documents to the public. See *Coastal States Gas Corp.* v. *Department of Energy*, 644 F.2d 969, 978-980 (3d Cir. 1981); *Irons* v. *Bell*, 596 F.2d 468, 471-472 n.6 (1st Cir. 1979).

As this Court has stated:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. *It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.*

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[16] The court of appeals stated that the CIA should have proffered its testimony at an earlier date because it knew by virtue of respondent's opposition to its claims for exemption that the sufficiency of its affidavits was in issue (App. A, *infra*, 19a). The court of appeals overlooks the fact that the plaintiff in an FOIA suit almost invariably challenges the agency's claims of exemption and the sufficiency of its affidavits. Thus, the court of appeals' approach would result in the premature submission of *in camera* materials in virtually all national security cases.

*United States* v. *Nixon*, *supra*, 418 U.S. at 710, quoting *C. & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (emphasis added). Thus, before ordering the release of the information, the district court was required to ensure that the CIA had a full opportunity to explain the national security grounds for withholding it.

The approach of the court of appeals and district court in rejecting the CIA's offer to make an *in camera* submission in this case reduces litigation regarding the release of sensitive national security information relating to intelligence sources and methods to a speculative undertaking, with the outcome turning on matters of tactics, form, and timing. This approach conflicts with a decision of the Second Circuit in similar circumstances, where the court of appeals remanded for consideration of an *in camera* affidavit offered after the district court had ordered disclosure. See *Weberman* v. *NSA*, 646 F.2d 563 (2d Cir. 1980), rev'g 490 F. Supp. 9 (S.D.N.Y. 1980), on remand, No. 77-Civ. 5058-CLB (S.D.N.Y. June 5, 1981) (the court, after considering NSA's affidavit, was "persuaded that * * * [NSA's] argument is valid, and probably should have so found upon its initial consideration of the matter").

3. The Framers recognized that because the President is the "sole organ of the nation in its external relations" (10 Annals of Cong., col. 613 (1800)), he must "be able to manage the business of intelligence in such manner as prudence may suggest." *The Federalist*, No. 64, at 435 (J. Cooke ed. 1961) (J. Jay). This principle has been recognized from the earliest days of the Republic (see *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)) to the present day (*Haig* v. *Agee*, *supra*, slip op. 26; *Snepp* v. *United States*, *supra*, 444 U.S. at 511-513 & n.7; *United States* v. *Nixon*, *supra*, 418 U.S. at 710). Moreover, when Congress amended the FOIA in 1974, it recognized, as this Court has (see page 21, *supra*), that "the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result

of public disclosure of a particular classified record." H.R. Conf. Rep. No. 93-1380, *supra*, at 12. It was for this very reason that Congress directed the courts to give "substantial weight" to the Executive's views regarding the details of the classified status of documents. *Ibid.* Such an approach is in any event required in order to conform to the *constitutional* principle that courts accord the "utmost deference" to the Executive with respect to military or diplomatic secrets. *United States* v. *Nixon*, *supra*, 418 U.S. at 710. Thus, the Court should adopt a construction of the FOIA that avoids the grave constitutional question that would be presented if that Act were construed to permit the courts, in a case such as this, to substitute their judgment for that of the Executive regarding the need to maintain the confidentiality of information that could disclose intelligence sources or secret foreign government information. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).[17]

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[17] We have not sought review at this time of the court of appeals' holding that the 35 documents originated by the three House committees and the 11 documents prepared by the CIA in connection with the congressional investigation are "agency records," not congressional records that are outside the scope of the FOIA.

Significant portions of these documents contain sensitive national security information or would, if released, reveal aspects of a congressional investigation the House of Representatives has not chosen to make public. The court of appeals remanded with express directions to the district court to consider the exemptions claimed by the CIA for the 11 CIA-generated documents (App. A, *infra*, 10a). It is unclear whether these express directions also apply to the 35 congressionally-generated documents. However that may be, we do not read the court of appeals' opinion to *foreclose* consideration of claims of exemption for these documents and thereby to require their immediate release. The court of appeals simply reversed the district court's order of summary judgment in favor of the CIA on another ground.

Moreover, the court of appeals has recognized that it would be especially inappropriate to foreclose the assertion of an exemption where necessary to protect national security information. See *Jordan* v. *Department of Justice*, 591 F.2d 753, 780 (D.C. Cir. 1978) (en banc); see also *Coastal States Gas Corp.* v. *Depart-*

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1981

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*ment of Energy*, 644 F.2d 969, 985 n.80 (3d Cir. 1981); cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 165 n.30 (1975). The court of appeals also has recognized that similar considerations apply when personal privacy is at stake. *Ryan* v. *Department of Justice*, 617 F.2d 781, 791-792 (D.C. Cir. 1980). We must assume that the court would show equal deference to congressionally generated documents that concern aspects of a congressional investigation that the House of Representatives has not chosen to make public (see United States Constitution, Article I, Section 5, Clause 3).

## APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 79-2143 & 79-2202

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, APPELLANT

*v.*

CENTRAL INTELLIGENCE AGENCY AND STANSFIELD TURNER

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Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 79-0151)

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Argued September 9, 1980

Decided December 23, 1980

*Dorothy Sellers* for appellant.

*Freddi Lipstein*, Attorney, Civil Division, Department of Justice, with whom *Alice Daniel*, Assistant Attorney General, *Charles F. C. Ruff*, United States Attorney, and *Leonard Schaitman*, Attorney, Civil Division, Department of Justice, were on the brief, for appellee.

*Stanley M. Brand*, General Counsel to the Clerk, United States House of Representatives, with whom

*Steven R. Ross*, Assistant Counsel to the Clerk, was on the brief, for amicus curiae, Clerk of the United States House of Representatives.

Before BAZELON, *Senior Circuit Judge*, and MIKVA and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: In May of 1978, appellant (Unification Church) filed a request pursuant to the Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552 (1976), for all Central Intelligence Agency (CIA or Agency) records relating to the Church or to its members. When the Agency failed to respond, appellant filed this action for injunctive relief. Since then, the Agency has disclosed some documents in their entirety but, claiming a variety of exemptions, has withheld parts or all of others. On cross-motions for summary judgment, and after examining the documents *in camera*, the court below ruled that most of the unreleased material was exempt. The court did, however, order disclosure of at least segments of nine documents. Each party appeals from that portion of the district court's order adverse to it.[1]

The Church appeals the court's ruling that about fifty of the documents were not agency records because they were subject to congressional control and therefore were exempt under 5 U.S.C. § 551(1)(A) (1976). Of these documents, thirty-five were generated by Congress and sent to the CIA for reasons that are in dispute. The remaining fifteen originated in the Agency but were related to congressional investigations; some of these records were sent to Congress and were then returned to the CIA—again for

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[1] The district court's opinion, Civ. No. 79-0151 (D.D.C. July 30, 1979), is reprinted in the Joint Appendix (JA) at 113.

reasons that are not entirely clear. We find that these fifty documents, even if once excluded from the FOIA as congressional records, are no longer covered by that exemption because Congress failed to express with sufficient clarity its intent to retain control over the documents. We therefore reverse the district court's holding with respect to these records and remand for consideration of other exemptions of the Act which the Agency claimed apply to these records and on which the court below had no occasion to rule.

The Church also disputes the district court's holding that the CIA could invoke FOIA exemption 3 and refuse to disclose ten documents in order to protect intelligence sources under 50 U.S.C. § 403(d)(3) (1976). Relying on this court's recent opinion in *Sims* v. *Central Intelligence Agency*, Nos. 79-2203 & 79-2554 (D.C. Cir. Sept. 29, 1980), we affirm the court's finding of exemption.[2]

On cross-appeal, the CIA challenges the court's order of disclosure with respect to six documents. The Agency alleges three errors: that the court did not give substantial weight to the Agency's affidavits; that the court failed to articulate reasons for its disclosure order; and that the court refused to accept the Agency's post-judgment offer of further evidence in the form of an *in camera* affidavit. We reject all arguments raised on the cross-appeal.

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[2] The court agreed with the CIA that the other deleted portions of the documents were protected by FOIA exemptions 1, 3, and 6. Some of these documents are involved in the cross-appeal, but the Church has not challenged the district court's order that the bulk of the unreleased material is exempt.

## I. Communications Between Congress and the CIA

### A. *Records Generated by Congress*

Thirty-five of the documents the Church seeks are, in the words of the court below, "correspondence and memoranda originated by one of four congressional committees that investigated various aspects of Korean-American relations between 1976 and 1978." Mem. op. at 3, JA at 115 (footnote omitted). These materials were, the district court found, sent to the CIA for safekeeping. Relying on this court's opinion in *Goland* v. *Central Intelligence Agency*, 607 F.2d 339 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), the court below ruled that, because Congress retained control over the thirty-five documents, they were not "agency records" subject to disclosure under the FOIA.

Although *Goland* does stand for the proposition that records in an agency's possession may be congressional documents, as opposed to agency records, that case does not support the conclusion of the court below. In *Goland*, this court began by noting that "agency" as defined in the Administrative Procedure Act does not include Congress. *See* 5 U.S.C. § 551 (1)(A) (1976). Finding that Congress has the authority to keep its records secret, the court articulated the following test for determining the applicability of the FOIA to documents such as those requested here:

> Whether a congressionally generated document has become an agency record . . . depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposi-

> tion of the agency with which the document resides.

607 F.2d at 347. The court considered two factors dispositive: the circumstances attending the document's creation and the conditions under which it was transferred to the agency. Consideration of those factors led the court to hold that the document sought by plaintiffs there—a stenographic transcript of hearings held before a House committee, which had been forwarded to the CIA—was a congressional, rather than an agency, record.

Thus, Congress can assert its exemption from the FOIA; it can also reassert the exemption. But the exemption can be lost if there is a request for documents at a time when Congress has not designated the documents as falling within congressional control.

Comparison of the facts of *Goland* with those involved here convinces us that Congress did not indicate its intent to maintain control over the documents requested by the Church. The hearing transcript at issue in *Goland* was quite obviously meant to be secret: the congressional committee met in executive session to conduct the hearing; the stenographer and typist were sworn to secrecy; and the transcript was marked "Secret." In addition, the confidential nature of the transcript was evident—it was known to contain "discussions of basic elements of intelligence methodology, both of this country and of friendly foreign governments, as well as detailed discussions of the CIA's structure and disposition of functions." 607 F.2d at 347 (footnote omitted).

In contrast, the circumstances surrounding Congress' creation of the documents requested by the Church do not demonstrate any intent that they be kept secret. The district court failed to analyze this

first element of the *Goland* test, and appellees can only assert that the records were "created in the context of sensitive investigations concerning Korean-American relations." Brief for Appellee at 31. Although perhaps sensitive, not every aspect of the work of these congressional committees was confidential; in fact, the House Subcommittee on International Relations published a 1200-page report on the investigation. Appellees' general characterization thus does not suffice to prove that no part of the thirty-five documents may be disclosed.[3]

The second prong of the *Goland* test inquires whether Congress transferred the records in such a way as to manifest its intent to retain control. In *Goland*, for example, this court found that

> [t]he fact that the CIA retains the Transcript *solely for internal reference purposes* indicates that the document is in no meaningful sense the property of the CIA; the Agency is not free to dispose of the Transcript as it wills, but holds the document, as it were, as a "trustee" for Congress.

607 F.2d at 347 (emphasis supplied).

Here, the Agency maintains—and the district court agreed—that the CIA was given the records for safekeeping. But the record does not support that finding. The Agency affidavit discussing these documents does not specify the purpose of their transfer to the CIA. *See* Affidavit of Frederick P. Hitz, CIA Legislative

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[3] An entire document is, of course, not exempt merely because isolated portions of it may be protected from disclosure. *See Vaughn* v. *Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

Council, JA at 99.[4] Moreover, that affidavit makes clear that only some congressional documents transferred to the CIA contain classified information or details of intelligence activities. *See id.* at 100.

As evidence of Congress' intent to retain control over these records, the court below and appellees do point to a letter to the CIA from the Clerk of the House of Representatives, which objected to the release of any portion of the thirty-five documents. *See* JA at 104. But this letter was written as a result of the Church's FOIA request and this litigation—long after the actual transfer to the CIA. *See id.*; Document Disposition Index, JA at 75. We do not consider the letter sufficient evidence that Congress forwarded the documents to the Agency only "for a limited purpose and on condition of secrecy." *Goland*, 607 F.2d at 348 n.48. *Cf. Halperin* v. *Department of State*, 565 F.2d 699, 705 (D.C. Cir. 1977) (remarks regarding national security justification for classification of press conference transcript, which were made five months after classification and eight months after press conference, did not necessarily reflect true reasons for classification).

Comparison of the circumstances surrounding the transfer to the CIA of three sealed cartons of additional congressional documents is instructive. These records, which are not at issue here, also relate to Congress' investigation into Korean-American relations. When these materials were sent to the Agency, they were accompanied by a memorandum from the

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[4] In contrast, in describing three sealed cartons of other documents transferred to the CIA from the House Committee on International Relations, the affidavit specifies that "[s]ince the cartons are merely held by CIA in security custody, the actual contents are not known to CIA." JA at 100.

House Committee on International Relations indicating that the Committee retained jurisdiction over the documents, that the documents contained classified information, and that access to the files was limited to those with authorization from the Clerk of the House. JA at 103. As a result of these instructions, the Agency has not opened the sealed cartons, does not know their contents, and maintains them for the express purpose of safekeeping. *See* Hitz Affidavit, JA at 100. The thirty-five documents in dispute here, on the other hand, were forwarded to the CIA without any such instructions, and the Agency appears to be aware of their content.[5]

Although we hold that Congress failed to assert control over these thirty-five documents, we do not adopt appellant's position—that Congress must give contemporaneous instructions when forwarding congressional records to an agency. Nor do we direct Congress to act in a particular way in order to preserve its FOIA exemption for transferred documents. Nevertheless, both the spirit of the Act and *Goland* require some clear assertion of congressional control. Nothing here—either in the circumstances of the documents' creation or in the conditions under which they were sent to the CIA—indicates Congress' intent to retain control over the records or to preserve their secrecy.

B. *Records Generated by the CIA*

Also in dispute are fifteen documents created by the CIA and related to Congress' investigation of

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[5] We reject the Agency's assertion that the memorandum accompanying the three sealed cartons of materials was intended to apply also to the thirty-five documents at issue here. That memorandum seems specifically related to the three boxes of documents which it accompanied. *See* JA at 103.

Korean-American relations.[6] Eleven of these were sent to Congress in response to a congressional inquiry and were then returned to the Agency, again without instruction. The court below read *Goland* as extending to these eleven documents and to all materials prepared by an agency specifically at the request of Congress. Mem. op. at 4, JA at 116. The court refused, however, to apply *Goland* to purely internal memoranda that are created at the initiative of the agency and are not intended for Congress, even if such documents relate to congressional investigations. *Id.* at 4-5, JA at 116-17. The court found that four of the fifteen documents were merely inter- or intra-agency memoranda that were not directly sent to Congress and therefore were not entitled to exemption as congressional documents. *Id.* at 5, JA at 117.[7]

We reverse the court's ruling that any of these fifteen records qualified as congressional records. In so doing, we do not find it necessary to decide whether *Goland*, which involved communications from Congress to an agency, applies to transfers in the other direction. That is, we do not resolve the question whether agency-created records, when sent to Congress, can lose their status as agency records and become exempt from FOIA disclosure.[8] Instead, we

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[6] These are Documents 47-61.

[7] The court directed the CIA to segregate non-exempt portions of these four documents (Documents 52, 53, 56, & 57). After reviewing the supplemental materials and inspecting the documents *in camera*, the court held them protected by exemptions 1 and 3. The Church has not appealed from this ruling.

[8] *Cf. Goland*, 607 F.2d at 348 n.48 (statement prepared by CIA Director and delivered before House Committee not a congressional document).

hold that, even if these CIA-created records were once congressional documents because generated in response to congressional inquiries and transferred to Congress, they subsequently lost their exemption as congressional records when Congress failed to retain control over them.

Again, we rely on the two-pronged *Goland* test. As with the congressional records analyzed above, there is no evidence surrounding the generation of these CIA-created records indicating that Congress intended that they remain secret. The conditions under which they were transferred back to the CIA are similarly ambiguous: they were merely returned to the Agency with no accompanying letter or instructions. Appellees again point to the *post hoc* letter from the Clerk of the House, but, for the reasons discussed above, we find that letter insufficient evidence of Congress' intent to retain control over these documents.

The Agency argues in the alternative that, if the CIA-created documents are agency records and thus within the ambit of the FOIA, various other exceptions mandate nondisclosure of all or portions of the materials: exemptions 1 and 3 of the FOIA, which protect national security information and intelligence sources and methods, 5 U.S.C. § 552(b)(1) & (3); the deliberative process privilege, included within exemption 5 of the Act, 5 U.S.C. § 552(b)(5); and constitutional protection of the legislative process under the Speech or Debate Clause, art. 1, § 6, cl. 1. Because the court below found the documents exempt as congressional records, it had no occasion to rule on these additional arguments. We therefore remand for consideration of the applicability of these exemptions.

## II. Protection of Intelligence Sources

The second major challenge made by the Church involves ten documents withheld by the Agency on the ground that they were covered by exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), because their disclosure would endanger intelligence sources. Exemption 3 excludes from the FOIA's coverage records specifically exempted from disclosure by statute. We have held that one such withholding statute is section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3) (1976), which imposes on the Director of Central Intelligence responsibility for "protecting intelligence sources and methods from unauthorized disclosure." *See, e.g., Halperin* v. *Central Intelligence Agency*, No. 79-1849, slip op. at 4 & n.7 (D.C. Cir. July 11, 1980); *Goland* v. *Central Intelligence Agency*, 607 F.2d 339, 349 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979), *cert denied*, 445 U.S. 927 (1980).

The Church disputes the CIA's definition of "intelligence source"; specifically, appellant contests the Agency's right to withhold documents under these statutes in order to protect those who have not received a pledge of confidentiality from the Agency. Those who voluntarily provide information to the CIA, or do so without a promise of confidentiality, argues the Church, are not intelligence sources within the meaning of the statute.

Since briefing and argument in this case, this court has addressed this issue and examined the meaning of "intelligence source" in the context of FOIA disclosure. *See Sims* v. *Central Intelligence Agency*, Nos. 79-2203 & 79-2554 (D.C. Cir. Sept. 29, 1980). There, we rejected the broad definition of "intelligence source" advanced by the CIA in that case, which included anyone providing information ration-

ally related to national security. Instead, recognizing that the appropriate focus is on "the practical necessity of secrecy," the court defined "intelligence source" as follows:

> [A] person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

Slip op. at 20. The court thus declined to adopt either the expansive construction of "intelligence source" suggested by the Agency in *Sims* or the rigid interpretation urged upon us here by the Church.

Having applied the *Sims* definition to the documents at issue here, we find no error in the finding of the court below, which inspected the records *in camera*, that they are covered by exemption 3. The Document Disposition Index[9] submitted by the Agency specifically indicates that three of the ten documents are withheld because their disclosure would identify persons who gave information with the understanding that it would be kept in confidence.[10] Three others detail "clandestine contacts" between the Agency and the informant.[11]

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[9] The Document Disposition Index describes the various portions of the documents for which the Agency claims exemption and the reasons for those claims, in compliance with this court's opinion in *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[10] *See* JA at 48 (Document 12; *id.* at 52 (Document 17); *id.* at 64 (Document 31).

[11] *See* JA at 42-43 (Document 4); *id.* at 45-46 (Document 8); *id.* at 61 (Document 27).

The index with respect to the remaining four documents does not specifically mention confidentiality, but we are satisfied from the descriptions that the information contained in those documents is of the type that the Agency could not obtain without a guarantee of confidentiality.[12] Moreover, the Agency affidavit accompanying the Document Disposition Index indicates that all documents withheld on the basis of exemption 3 contain information from persons who willingly cooperated with the CIA on a pledge of secrecy. *See* Affidavit of Robert E. Owen, Information Review Officer for the CIA's Directorate of Operations, JA at 23-24.

We therefore affirm the holding of the court below that the Agency was entitled to withhold these ten documents in their entirety in carrying out its statuory duty to protect intelligence sources.

## III. The Cross-Appeal

On cross-appeal, the CIA challenges the district court's ruling that portions of five documents and another entire record must be disclosed to the Church. The court rejected the Agency's assertion that this material was protected by exemptions 1, 3, and 6.[13] Although the government has turned over the seg-

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[12] *See* JA at 55-56 (Document 21); *id.* at 57-58 (Document 22); *id.* at 58 (Document 23); *id.* at 70 (Document 39).

[13] Exemption 1, 5 U.S.C. § 552(b)(1), protects classified, national security information. Exemption 3, *id.* § 552(b)(3), covering material specifically exempted by statute, prevents release of records whose disclosure would endanger intelligence sources. *See* section II *supra*. Personnel and similar files whose disclosure would constitute a clearly unwarranted invasion of personal privacy are protected by exemption 6, 5 U.S.C. § 552(b)(6).

ments for which an exemption 6 claim was made, it contests the court's finding that exemptions 1 and 3 are inapplicable to these documents. Specifically, the Agency maintains that the court erred in failing to give sufficient weight to the Agency's affidavits, in not providing reasons for its disclosure order, and in rejecting the CIA's post-judgment offer of an *in camera* affidavit. We dismiss each of these arguments in turn.

A. *Deference to Agency Affidavits*

The CIA alleges, first, that the court below failed to accord to the Agency's affidavits the deference required by decisions of this court. The FOIA directs trial courts to conduct de novo review of an agency's claim of exemption, while at the same time giving "substantial weight" to the agency's affidavits. *See Halperin* v. *Central Intelligence Agency*, No. 79-1849, slip op. at 7 (D.C. Cir. July 11, 1980); *Hayden* v. *National Security Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert denied*, 100 S. Ct. 2156 (1980). And, in the area of national security, as is allegedly involved here, courts must be especially sensitive to an agency's expertise.

Nevertheless, the affidavits submitted by an agency must be specific enough to enable the judge to execute his responsibility to make a de novo determination of exemption. Such affidavits will be sufficient to justify summary judgment without *in camera* inspection when they meet the following standard:

> [T]he affidavits must show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency's claims are conclusory, merely reciting

> statutory standards, or if they are too vague or sweeping. If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.

*Hayden*, 608 F.2d at 387 (footnote omitted).

If the affidavits do not satisfy this standard, the trial judge may inspect the documents *in camera*. In deciding whether and how to conduct review *in camera*, the court has substantial discretion. *See Hayden*, 608 F.2d at 1384; *Ray* v. *Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978). In fact, in amending the FOIA in 1974 to permit *in camera* inspection, *see* 5 U.S.C. § 552(a)(4)(B), Congress indicated its intent to facilitate *in camera* inspection and to minimize judicial unwillingness to take an active role in reviewing FOIA claims. *See Allen* v. *Central Intelligence Agency*, No. 80-1380, slip op. at 14-21 (D.C. Cir. Nov. 12, 1980).

The court below followed the appropriate procedures and standards here. Finding that the Agency's affidavits were "of a general nature," which made it "impossible to undertake meaningful review" of the CIA's "broad, often conclusory claims in the area of national security," the court determined that *in camera* review was necessary. Mem. op. at 2, JA at 114 (footnote omitted). We do not find this characterization of the affidavits and Document Disposition Index inaccurate. The descriptions of the documents are primarily conclusory and often repeat the terms of the FOIA, thereby impeding the court's efforts to rule on the claims of exemption. *See Allen*, slip op. at 9,

13, 22. As the court below recognized, such generality is understandable in a national security context, where a detailed affidavit may be as damaging to governmental concerns as actual disclosure of the document.

The district court thus undertook to review the documents itself. We find no abuse of discretion in this decision.

B. *Explanation of Disclosure Order*

The second argument raised by the Agency on cross-appeal criticizes the court below for failing to articulate a justification for its order that at least segments of a few documents be disclosed to the Church. In ruling in appellant's favor, the court merely remarked that the Agency's claims of exemption had been "overly broad" with respect to some documents. Mem. op. at 6, JA at 118.

This court has previously observed that a more informative statement of rationale by trial courts facilitates the appellate inquiry in FOIA cases. *See Schwartz* v. *Internal Revenue Service*, 511 F.2d 1303, 1307 (D.C. Cir. 1975); *Vaughn* v. *Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Ackerly* v. *Lee*, 420 F.2d 1336, 1341-42 (D.C. Cir. 1969). And this court has even remanded for a more detailed explanation from the trial court. *See Ackerly*, 420 F.2d at 1341-42; *cf. Schwartz*, 511 F.2d at 1307-08 (reversing district court's denial of motion for clarification).

Although we agree that a more complete indication of the district court's rationale would have been helpful here, we decline to reverse on this ground. The cases cited above emphasize the special importance of a statement of reasons to those requesting docu-

ments, who do not know the exact content of the records and whose efforts to argue for disclosure are therefore hampered. That need is less pressing where, as here, those seeking a fuller justification from the district court are the ones with custody over the documents and knowledge of their contents. And the CIA has not alleged here any prejudice to its efforts on appeal from the failure of the court below to say more than that inspection of the records did not corroborate the Agency's assertions of exemption.[14]

We wish to reiterate, however, that the preferable practice is a full explanation by the district court of both rulings of exemption and orders of disclosure. Here, for example, the court below should have indicated why it found the documents unprotected by the exemptions claimed.

C. *Post-Judgment Offer of Proof*

Finally, the Agency argues that the court below erred in denying its Motion for Partial Relief from Judgment, which included an offer of an *in camera* affidavit explaining in greater detail the Agency's determination that the material was covered by exemptions 1 and 3. Citing *Public Citizen Health Research Group* v. *United States Dep't of Labor*, 591 F.2d 808 (D.C. Cir. 1978), the CIA maintains that if the court below found the Agency's affidavits insufficient, it should have accepted the post-judgment offer of additional proof. The national security ramifications of revealing the information contained in the documents may not have been apparent, notes the Agency, from inspecting the documents.

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[14] The Agency did not, for example, submit a motion for clarification, as had the appellant in *Schwartz* v. *Internal Revenue Service*, 511 F.2d 1303 (D.C. Cir. 1975).

In *Public Citizen Health Research Group*, this court did reverse a trial court's refusal to examine an *in camera* affidavit that explained why disclosure of the document at issue would harm privacy interests. But there the affidavit was submitted from the outset and not, as here, after *in camera* inspection and judgment.

Even if an *in camera* affidavit would have been helpful and appropriate here, the court below did not abuse its discretion in denying the Agency's post-judgment offer of proof.[15] The interests of judicial economy and finality militate against a court's tolerating a piecemeal approach by a party. This court has accordingly directed that agencies not make new exemption claims to a district court after the judge has ruled in the other party's favor. *See Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd.*, 482 F.2d 710, 721-22 (D.C. Cir. 1973) (upholding denial of motion for rehearing), *rev'd on other grounds*, 421 U.S. 168 (1975). Similarly, an agency may not wait until appeal to raise additional claims of exemption or additional rationales for the same claim. *See Ryan* v. *Department of Justice*, 617 F.2d 781, 792 (D.C. Cir. 1980); *Jordan* v. *United States Dep't of Justice*, 591 F.2d 753, 779-80 (D.C. Cir. 1978) (en banc); *Vaughn* v. *Rosen*, 523 F.2d 1136, 1143 (D.C. Cir. 1975). In *Ryan*, for example, the court warned of "[t]he danger of permitting the Government to raise its FOIA exemption claims one at a time, at different stages of a district court proceeding." 617 F.2d at 792.

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[15] This court has indicated that *in camera* affidavits, though appropriate in some cases, should be used with caution because they do not permit a response from the opposing party. *See Allen* v. *Central Intelligence Agency*, No. 80-1380, slip op. at 22 n.63 (D.C. Cir. Nov. 12, 1980).

Here the Agency knew that the sufficiency of its affidavits was at issue—the Church had questioned the government's claims of exemption in its motion for summary judgment. If the Agency felt that it could not give a complete explanation on the record of its reasons for asserting exemptions 1 and 3, it should have considered submitting an *in camera* affidavit at a much earlier point.

Moreover, despite the Agency's suggestion to the contrary, this is not a case in which the government's exemption arguments were not explored in depth below. The court conducted a thorough *in camera* inspection of the documents, and it had as a guide the Agency's Document Disposition Index, which explained in general terms the Agency's national security concerns and justifications for its exemption claims.[16] An *in camera* affidavit may have provided more details, but the contours of the CIA's arguments were evident in the Index. And we have detected no indication that these arguments were not understood or fully considered by the court below. We therefore find no abuse of discretion in the denial of the Agency's Motion for Partial Relief from Judgment and refusal of an *in camera* affidavit.[17]

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[16] Typically, when an agency's affidavits are an insufficient basis for summary judgment, a trial court will inspect the documents *in camera or* accept *in camera* affidavits. *See Hayden* v. *National Security Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 2156 (1980).

[17] Moreover, the court below granted the CIA a stay of its disclosure order pending appeal, and the Agency has not been able to elaborate on the need for an *in camera* affidavit on appeal. It only alleges that the court paid insufficient attention to its affidavits and failed to understand the national security

## IV. Conclusion

Because we find that Congress failed to exercise its control over both the Congress-created records transferred to the CIA and the CIA-generated documents sent to Congress, we hold that neither set of materials contains congressional records immune from the FOIA under 5 U.S.C. § 551(1)(A). Congress obviously has the prerogative to act to ensure the secrecy of its records and their exemption from the FOIA. But applying the criteria first articulated by this court in *Goland* v. *Central Intelligence Agency*, we detect nothing in either the circumstances attending these documents' generation or the conditions under which they were transferred between Congress and the Agency that indicates that Congress intended to retain control over them. Accordingly, we reverse on this point, but remand for consideration of the Agency's other exemption claims never ruled on below.

We affirm all other portions of the district court's opinion and reject both the Church's arguments with respect to the definition of "intelligence source" and the CIA's challenges on cross-appeal to the court's disclosure order.

*Reversed and remanded.*

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implications of disclosure, speculations that are unsupported by the record.

We reject the Church's contention that the district court's imposition of a stay was an abuse of discretion. *See Providence Journal Co.* v. *Federal Bureau of Investigation*, 595 F.2d 889 (1st Cir. 1979).

**APPENDIX B**

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1980

Civil Action No. 79-0151

No. 79-2143

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, APPELLANT

*v.*

CENTRAL INTELLIGENCE AGENCY and STANSFIELD TURNER

Civil Action No. 79-0151

79-2202

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY

*v.*

CENTRAL INTELLIGENEC AGENCY, ET AL., APPELLANTS

Appeals from the United States District Court for the District of Columbia

Before: BAZELON, Senior Circuit Judge and MIKVA and Edwards, Circuit Judges

## JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for

the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court on appeal herein is hereby affirmed in part; reversed in part; and the cases are remanded to the District Court, all in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: December 23, 1980

Opinion for the Court filed by Circuit Judge Mikva.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1980

Civil Action No. 79-0151

No. 79-2143 & 79-2202

[Filed Apr. 2, 1981]

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, APPELLANT

*v.*

CENTRAL INTELLIGENCE AGENCY and STANSFIELD TURNER

Before: BAZELON, Senior Circuit Judge, MIKVA and EDWARDS, Circuit Judges

### ORDER

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Circuit Judge Mikva in the above entitled case on December 23, 1980 be, and it hereby is, amended as follows:

Page 12, lines 1-4, strike:

> We therefore affirm the holding of the court below that the Agency was entitled to withhold these ten documents in their entirety in carrying out its statutory duty to protect intelligence sources.

Insert in lieu thereof:

We therefore affirm the holding of the court below, as specified in its order, *see* mem. op. at 6, JA at 118, that the Agency was entitled to withhold some of these ten documents in their entirety, and others in part, in carrying out its statutory duty to protect intelligence sources.

Per Curiam

For the Court
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

**APPENDIX D**

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1980

Civil Action No. 79-0151

No. 79-2142

[Filed Aug. 13, 1981]

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, APPELLANT

*v.*

CENTRAL INTELLIGENCE AGENCY, ET AL.
and consolidated case no. 79-2202

ARGUED: 9-9-80

Before: Bazelon, Senior Circuit Judge; Mikva and Edwards, Circuit Judges

### ORDER

The Clerk is directed to file the lodged petition for rehearing and suggestion for rehearing *en banc*, with attachments, and on consideration thereof, it is

ORDERED by the Court that the petition for rehearing is denied.

*Per Curiam*
For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

*Statement of BAZELON, Senior Circuit Judge*: I would grant rehearing in 79-2202. The district court should have offered some explanation for its partial rejection of cross-appellant's national security exemption claim, 5 U.S.C. § 552(b)(1)(a) (1976). *See Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1980

Civil Action No. 79-0151

No. 79-2143

[Filed Aug. 13, 1981]

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, APPELLANT

*v.*

CENTRAL INTELLIGENCE AGENCY, ET AL.
and consolidated case no. 79-2202

Argued: 9-9-80

Before: Robinson, Chief Judge; Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

The suggestion for rehearing *en banc* has been circulated to the full court and a majority of the court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestion for rehearing *en banc* is denied.

*Per Curiam*
For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Tamm, MacKinnon, Robb and Wilkey would grant the suggestion for rehearing *en banc*.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0151

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, PLAINTIFF

*v.*

CENTRAL INTELLIGENCE AGENCY, ET AL., DEFENDANTS

Filed July 27, 1979

MEMORANDUM AND ORDER

Plaintiff ("Unification Church"), a corporation engaged in religious activities on a worldwide basis, brings this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1976), seeking disclosure of all documents relating to it that are in the possession of the Central Intelligence Agency ("CIA"). The Agency, after administrative consideration, disclosed certain documents in their entirety and withheld all or parts of others. Defendants argue that information withheld is exempt from disclosure under one or more provisions of FOIA, while plaintiff contests each excision or total exclusion. The matter is before the Court on cross-motions for summary judgment.

The documents at issue include some seventy generated by the CIA and a comparable number in CIA possession that originated with other executive agencies or with Congress. Much of the material involves

congressional and Department of Justice inquiry into Korean-American relations during the late 1970's, and refers only incidentally to the Unification Church or its founder Sun Myung Moon.

A defendant in a FOIA action is required to furnish descriptions of all deleted document segments, and to itemize and justify each deletion under a particular exemption in the Act. *Vaughn* v. *Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The Agency submitted lengthy affidavits at the Court's request, describing deletions and identifying exemptions claimed for each segregable deletion or withheld document. With the few exemptions noted below, the itemizations of exemption satisfy the formal indexing requirements set forth in *Vaughn* v. *Rosen*, *supra*, and recently amplified by this Circuit. *Founding Church of Scientology of Washington, D.C.* v. *Bell*, No. 78-1391 (D.C. Cir. June 25, 1979).[1]

The document descriptions, however, are of a general nature, and the Court has found it impossible to undertake meaningful review on the basis of defendants' broad, often conclusory claims in the area of national security.[2] The issue of national security

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[1] The Agency affidavits satisfy defendants' additional burden of demonstrating that appropriate classification review and declassification procedures have been followed, pursuant to Executive Order 12065. *See* Affidavits of Robert Owen at ¶¶ 3-5, Robert Gambino at ¶¶ 3-5, filed with defendants' motion for summary judgment.

[2] National security claims in this case arise under two exemptions, 5 U.S.C. § 552(b)(1) and (b)(3). Although defendants assert the applicability of two other exemptions to parts of the documents in question, 5 U.S.C. §§ 552(b)(5) (involving documents not otherwise available by law) and (b)(6) (involving invasions of personal privacy), they allege

is, of course, particularly sensitive, and the CIA argues it must move cautiously in order to avoid revealing the very information it seeks to protect. The normal specificity of document description contemplated by *Vaughn* v. *Rosen*, *supra*, becomes more difficult to attain in such instances. At the same time, the "substantial weight" that a court should accord "to an agency's affidavit concerning the details of the classified status of the disputed record" [3] can hardly be dispositive when the agency is unwilling or unable for whatever reason to furnish sufficient details. A court in meeting its statutory duty to conduct responsible de novo review may therefore go beyond agency affidavits and as urged by plaintiff in this instance institute *in camera* inspection of the documents unexpurgated. *Ray* v. *Turner*, 587 F.2d 1187 (D.C. Cir. 1978). As the public record here is not sufficient to permit a responsible determination, the Court has exercised its sound discretion to conduct a thorough *in camera* examination. *See Ray* v. *Turner*, *supra* at 1194-95. *See also Weissman* v. *Central Intelligence Agency*, 565 F.2d 692, 696 (D.C. Cir. 1977).

The Court has personally examined the documents at length and with care, reviewing each of defendants' claims for exemption, and sets forth its conclusions under four headings.

A. *Documents Retained by CIA Office of Legislative Counsel and Generated by Congress*

The records consist of correspondence and memoranda originated by one of four congressional com-

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that all contested documents not originated in Congress implicate to some extent issues of national security.

[3] S. Conf. Rep. No. 93-1200, 93 Cong., 2d Sess. 12 (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News 6285, 6290.

mittees [4] that investigated various aspects of Korean-American relations between 1976 and 1978. The Agency also has in its possession, not inspected by the Court, three sealed cartons of materials from the House Committee on Foreign Affairs, consisting "mainly of [Committee] staff notes on CIA files." [5] Congress has indicated no intention that any of these documents be surrendered to outside individuals—indeed a letter to the CIA Director from the Clerk of the House of Representatives suggests precisely the opposite intent.[6] The materials are direct products of Congress and are unquestionably entrusted to the Agency for safekeeping with the clear expectation that Congress retains control over disposition. They are not "agency records" at all, 5 U.S.C. § 551(1)(A), and therefore fall outside the scope of the FOIA disclosure requirements. *Goland* v. *Central Intelligence Agency*, No. 76-1800, slip op. at 10 (D.C. Cir. May 23, 1978).

B. *Documents Retained by CIA Directorate of Operations and Generated by CIA*

These 15 documents were originated by the Agency, which asserts that since they would not exist but for the congressional inquiries discussed above they too

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[4] House Committee on Foreign Affairs (formerly Committee on International Relations); House Select Committee on Intelligence; House Committee on Standards of Official Conduct; Senate Select Committee on Ethics. Thirty-three of the 36 documents originated with the Committee on Foreign Affairs and its Subcommittee on International Organizations.

[5] Memorandum from Beverly Lumpkin; defendants' exhibit F, attached to Affidavit of Frederick Hitz.

[6] *See* defendants' exhibit G, attached to Affidavit of Frederick Hitz.

should be exempt as congressional documents.[7] Defendants thus would extend the Court of Appeals' holding in *Goland* v. *Central Intelligence Agency*, *supra*, to apply to any documents produced by an agency so long as they bear some relation to an ongoing congressional inquiry. In *Goland*, the contested document was a transcript of a congressional hearing, marked "Secret" in several prominent places, and the Court found no evidence that a document so intimately related to Congress's exercise of oversight authority was intended for public disclosure, *id.* at 10-14. This Court interprets the reasoning of *Goland* to encompass communications specifically prepared on request for as well as received from Congress or any of its committes, unless overcome by a showing of congressional intent to relinquish control over such material. Congressional authority and control extend over documents exchanged directly with an agency in pursuit of Congress's originating intent. Most of the 15 documents may be so classified, in that they are responsive to inquiries from congressmen or congressional staff.

The Court does not read *Goland*, however, as extending congressional control to records generated by an agency at its own initiative and not intended for congressional consumption. It would be contrary to the policy preference for disclosure embodied in FOIA itself for an agency successfully to claim that a purely internal memorandum is exempted as a congressional document simply because it reveals the existence of or relates to a congressional investigation or oversight

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[7] Defendants claim exemption under two additional theories: that the records are privileged communications under 5 U.S.C. § 552(b)(5) and that they are confidential for national security reasons under 5 U.S.C. § 552(b)(1) and (b)(3). These theories are addressed in text below.

request. Four documents at issue here [8] are intra- or inter-agency communications that involve no direct exchange with a congressional committee. What little they disclose about congressional activities is either already in the public domain or can easily be excised.

These four documents may contain segments that are properly exempt from disclosure under one of the other exemptions claimed, 5 U.S.C. § 552(b)(1), (b)(3), or (b)(5). Having lost on their "congressional control" argument, defendants remain asserting multiple exemptions for each of the four documents as a whole. They have not attempted to segregate non-exempt material within the four documents. They must do so, under the rule of *Vaughn* v. *Rosen*, which applies to all the exemptions here claimed. *See Marks* v. *Central Intelligence Agency*, 590 F.2d 997, 1000 (D.C. Cir. 1978); *Ray* v. *Turner*, *supra* at 1197; *Mead Data Central, Inc.* v. *Department of the Air Force*, 566 F.2d 242, 259-60 (D.C. Cir. 1977). Defendants are to complete this task and resubmit the documents to this Court within ten days of the date of the Court's Order.

C. *Documents Retrieved from CIA Directorate of Operations (46) and Office of Security (4) and Generated by CIA*

These consist of reports, memoranda and letters from agents or informants—the CIA has segregated non-exempt portions and released most of the documents in excised form to plaintiff. After detailed review of all the documents, the Court finds representations of the material covered and particular exemptions claimed to be adequate except as specified below. No novel legal issues are raised here. In a

---

[8] Nos. 52, 53, 56, and 57.

few instances the Agency's claims are overly broad, particularly in the area of privacy, and the Court has corrected them. The Court therefore sustains the exemptions claimed in all particulars, except that defendants must release the following passages:

(1) Document No. 3:

| | |
|---|---|
| ¶ 3 | All but the first word. |
| ¶ 4 | From "stated that . . ." (line 20) to end of paragraph, deleting all identifying names. |

(2) Document No. 7:

| | |
|---|---|
| P. 1, ¶ 1 | From "and to maintain . . ." (line 9) to ". . . government officials" (line 11) |
| P. 2, ¶ 2<br>P. 3, ¶ 3 | From "During a . . ." (line 16) to ". . . defense circles" (line 9). |

(3) Document No. 14:

| | |
|---|---|
| PP. 2-10 | Entire body of text except for portions within brackets ([]) as marked on *in camera* submission. |

(4) Document No. 15:

| | |
|---|---|
| ¶21 | Last sentence. |

(5) Document No. 20:

| | |
|---|---|
| P. 1, ¶ 1 | All material claimed under privacy exemption ("L") up through P. 3, ¶ 3 (line 16). |
| P. 4, ¶ 4 | Entire paragraph, except for last sentence. |
| P. 10 | All privacy excisions from CC. (line 2) through GG. (line 9). |
| P. 11 | All privacy excisions. |

(6) Document No. 21:

PP. 1-10 Entire body of text except for portions within double brackets ([[]]) as marked on *in camera* submission.

(7) Document No. 21a:

PP. 2-4 All privacy excisions relating to institutions. These appear opposite AA, BB, CC, DD, EE on p. 2; opposite FF, GG, JJ, KK on p. 4.

(8) Document No. 41:

P. 2, ¶ 3 All privacy excisions.

P. 3, ¶ 3 All excisions labeled "K".

(9) Document No. S-4:

P. 2, ¶ 4 From "it is one . . ." (line 24) to ". . . contention." (line 25). Also the entire last sentence.

D. *Documents Retrieved from CIA and Generated by Other Executive Agencies*

Defendants, in conducting their FOIA search, discovered certain documents which were originated and classified by other executive agencies. Defendants have transmitted these documents to the originating agencies with the request that they be re-examined for possible declassification and disclosure, but have not followed up on the transmittals. The Court orders that the CIA promptly obtain from each executive agency its decision regarding the documents sought by plaintiff, and immediately forward a copy of this decision to plaintiff.

Defendants' motion for summary judgment is hereby granted with exceptions noted above; only in the instance of these exceptions is plaintiff's motion for summary judgment granted.

The Court reserves judgment as to the four documents for which further agency submissions are required.

SO ORDERED.

/s/ Gerhard A. Gesell
United States District Judge

July 27, 1979.

## APPENDIX G

# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-151

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, PLAINTIFF

*v.*

CENTRAL INTELLIGENCE AGENCY, ET AL., DEFENDANTS.

Filed Sep. 26, 1979

## ORDER

By Order of this Court dated July 27, 1979, defendants were ordered to resubmit four documents to the Court after segregating non-exempt material and supporting by particularization the exemptions claimed. This has now been done. The Court has reviewed the supplemental index and affidavit and has personally examined the four documents, numbered 52, 53, 56 and 57, *in camera*, and determined that all portions of these documents withheld are exempt. Document No. 52 is protected by (b)(3), and documents numbered 53, 56 and 57 are protected by (b)(1) and (b)(3). Accordingly, plaintiff's request for disclosure as to these documents is denied.

SO ORDERED.

/s/ Gerhard A. Gesell
United States District Judge

September 26, 1979.

## APPENDIX H

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-151

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, PLAINTIFF

*v.*

CENTRAL INTELLIGENCE AGENCY, ET AL., DEFENDANTS.

Filed Sep. 26, 1979

### ORDER

Upon consideration of the defendants' motion for partial relief from this Court's Order of July 27, 1979, plaintiff's opposition thereto, and the entire record herein, it is hereby

ORDERED that the motion be and is hereby denied, and it is further

ORDERED that defendants shall not be required to release any document pursuant to this Court's Order of July 27, 1979, pending appeal, provided defendants promptly cross-appeal.

/s/ Gerhard A. Gesell
United States District Judge

September 26, 1979.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-374

CENTRAL INTELLIGENCE AGENCY AND
WILLIAM J. CASEY, DIRECTOR, PETITIONERS

*v.*

HOLY SPIRIT ASSOCIATION FOR THE
UNIFICATION OF WORLD CHRISTIANITY

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 11, 1981.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 2nd
day of November, 1981.

## APPENDIX J

## SUPREME COURT OF THE UNITED STATES

No. A-330

CENTRAL INTELLIGENCE AGENCY AND
WILLIAM J. CASEY, DIRECTOR, PETITIONERS

*v.*

HOLY SPIRIT ASSOCIATION FOR THE
UNIFICATION OF WORLD CHRISTIANITY

---

## ORDER

---

UPON CONSIDERATION of the application of the Solicitor General,

IT IS ORDERED that the execution and enforcement of the judgments of the United States District Court for the District of Columbia, case No. 79-151, and the United States Court of Appeals for the District of Columbia Circuit, case Nos. 79-2143 and 79-2202, be, and the same are hereby, stayed pending receipt of a response and further order of the undersigned or of the Court.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 23rd
day of October, 1981.

**APPENDIX K**

## SUPREME COURT OF THE UNITED STATES

No. A-330

CENTRAL INTELLIGENCE AGENCY AND
WILLIAM J. CASEY, DIRECTOR, PETITIONERS

*v.*

HOLY SPIRIT ASSOCIATION FOR THE
UNIFICATION OF WORLD CHRISTIANITY

---

## ORDER

---

UPON FURTHER CONSIDERATION of the application of the Solicitor General and the response filed thereto,

IT IS ORDERED that the execution and enforcement of the judgments of the United States District Court of the District of Columbia, case No. 79-151, and the United States Court of Appeals for the District of Columbia Circuit, case Nos. 79-2143 and 79-2202, be and the same are hereby, further stayed pending the timely filing and disposition of a petition for a writ of certiorari in the above-entitled case. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order is to continue in effect pending the sending down of the judgment of this Court.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 17
day of November, 1981.

## APPENDIX L

## STATUTORY PROVISIONS AND EXECUTIVE ORDER INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

* * * * *

[(a)(4)] (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title),

provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * * *

2. Section 102 of the National Security Act of 1947, ch. 343, 61 Stat. 498, provides in pertinent part, as codified at 50 U.S.C. 403(d)(3):

(d) *Powers and duties.*

For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council—

* * * * *

(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: *Provided*, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: *Provided further*, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: *And provided further*, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

3. Section 6 of the Central Intelligence Agency Act of 1949, ch. 227, 63 Stat. 211, as renumbered by Section 21(b)(2) of Pub. L. No. 85-507, 72 Stat. 337, and codified at 50 U.S.C. 403g, provides in pertinent part:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: *Provided*, That in furtherance of this section, the Director of the Office of Management and Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5.

4. Executive Order No. 12065, 43 Fed. Reg. 28949 (1978); provides in pertinent part:

SECTION 1. ORIGINAL CLASSIFICATION.

1-1. *Classification Designation.*

1-101. Except as provided in the Atomic Energy Act of 1954, as amended, this Order provides the only basis for classifying information. Information may be classified in one of the three designations listed below. If there is reasonable doubt which designation is appropriate, or whether the information should be classified at

all, the less restrictive designation should be used, or the information should not be classified.

1-102. "Top Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

1-103. "Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

1-104. "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.

* * * * *

1-3. *Classification Requirements*:

1-301. Information may not be considered for classification unless it concerns:

* * * * *

(b) foreign government information;

(c) intelligence activities, sources or methods

* * * * *

1-302. Even though information is determined to concern one or more of the criteria in Section 1-301, it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security.

1-303. Unauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause at least identifiable damage to the national security.

* * * * *

1-5. *Identification and Markings*

* * * * *

1-505. Foreign government information shall either retain its original classification designation or be assigned a United States classification designation that shall ensure a degree of protection equivalent to that required by the entity that furnished the information.

SECTION 6. GENERAL PROVISIONS.

6-1. *Definitions.*

* * * * *

6-103. "Foreign government information" means information that has been provided to the United States in confidence by, or produced by the United States pursuant to a written joint arrangement requiring confidentiality with, a foreign government or international organization of governments.

6-104. "National security" means the national defense and foreign relations of the United States.

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# Opposition

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1098

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

CENTRAL INTELLIGENCE AGENCY
AND WILLIAM J. CASEY,
*Petitioners,*

v.

HOLY SPIRIT ASSOCIATION FOR THE
UNIFICATION OF WORLD CHRISTIANITY,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF IN OPPOSITION

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THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts properly applied Exemptions 1 and 3 of the Freedom of Information Act in ordering the release of apparently minor portions of six documents out of 103 documents considered.

2. Whether the court of appeals should have held that the district court, after finding the CIA's public materials inadequate for responsible *de novo* review, and after thoroughly examining the documents *in camera,* and after conferring *ex parte* with counsel for the CIA, was additionally required to accept the agency's offer of post-judgment, *ex parte, in camera* testimony.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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No. 81-1098

---

CENTRAL INTELLIGENCE AGENCY
AND WILLIAM J. CASEY,

*Petitioners,*

v.

HOLY SPIRIT ASSOCIATION FOR THE
UNIFICATION OF WORLD CHRISTIANITY,

*Respondent.*

---

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

## BRIEF IN OPPOSITION

---

## STATEMENT OF THE CASE[1]

This is a Freedom of Information Act case, 5 U.S.C. § 552. The CIA asks this Court for review as to six

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[1]Respondent accepts petitioner's brief as to jurisdiction, opinions below, and statutes involved. Respondent will follow petitioner's use of "(C.A. ____)" in referring to the appendix filed in the court of appeals and will use "(Pet. ____)" and "(Pet. App. ____)" in referring to the petition for a writ of certiorari and its appendix. The Freedom of Information Act will be referred to as "FOIA" or "the Act" and the Central Intelligence Agency as "the CIA". Finally, respondent will use the abbreviation "Source Book" for citations to the *Staff of Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974* (P.L. 93-502), Source Book: Legislative History, Texts, and Other Documents (March 1975).

documents on which it substantially prevailed in the lower courts.[2]

The case was decided in the district court on cross motions for summary judgment. The CIA filed first. It identified 103 documents responsive to respondent's FOIA request.[3] Of these, sixty were withheld in their entirety, two were released in their entirety, and forty-one were released with portions – usually substantial – withheld.

The CIA's motion for summary judgment related to the materials withheld and was based on the theory that no further disclosure was required of it under the FOIA. The CIA's factual basis for refusing disclosure as to the six documents here at issue was presented in the affidavit of its employee Robert E. Owen and in the document disposition index (the "index") accompanying that affidavit. The affidavit described the types of materials generally withheld but did not discuss or identify any specific document. The index contained an alphabetized "deletion category list" with deletion categories A through O. Each deletion category referred to certain paragraphs of the Owen affidavit and to the FOIA exemption invoked for that deletion category. This case primarily involves the CIA's reliance upon deletion category B, identified as:

---

[2]The remaining documents are not at issue in this Court either because there was no appeal from the district court's decision or no petition for a writ of certiorari from the court of appeals' decision.

[3]The record contains two slightly different request letters, each dated May 26, 1976. One was for "[a]ny and all material relating to the Holy Spirit Association for the Unification of World Christianity, Inc., otherwise known as the Unification Church." (C.A. 10). The second was for "[a]ll records relating to the Holy Spirit Association for the Unification of World Christianity, sometimes known as the Unification Church, or to any person known or classified as a member thereof." (C.A. 19). It appears that the CIA searched for documents responsive to the latter request (C.A. 16-17, 108).

> [c]ircumstancial information which, in combination with other information, could lead to the identification of an intelligence source, paragraphs 3-11, exemptions (b)(1) and (b)(3).

(C.A. 39).

The index also contained a numerical list of the documents retrieved, identifying each document by date and number of pages and listing the deletion categories which the CIA claimed were applicable to that document.

Respondent opposed the CIA's motion for summary judgment and cross moved for summary judgment. In accordance with the district court rule governing summary judgment practice,[4] respondent's opposition contained a "statement of genuine issues" which identified those issues which appeared inappropriate for summary judgment. Respondent identified the following:

> 1. Whether the affidavits and document disposition indexes filed by [the CIA] are sufficient for this court to undertake a *de novo* review of the [CIA's] claims of exemption from FOIA;
>
> 2. Whether the affidavits and document disposition indexes filed by [the CIA] are suffi-

---

[4]Rule 1-9(h) of the United States District Court for the District of Columbia is entitled, "MOTIONS FOR SUMMARY JUDGMENT" and provides, in pertinent part:

> A party opposing such a motion shall serve and file, together with his opposing statement of points and authorities, a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, and shall include therein references to the parts of the record relied on to support such statement.

> cient to carry their burden of proof on their claims to FOIA Exemptions 1, 3, 5 and 6.

Respondent's own motion for summary judgment requested that the district court review the underlying documents *in camera*. The CIA chose not to oppose respondent's motion for summary judgment, thereby allowing the district court to treat the motion as conceded in accordance with its rule governing motions practice.[5]

While the case was under submission on the cross motions for summary judgment, the district court reviewed the documents *in camera* (Pet.App. 31a) and conferred *ex parte* with counsel for the CIA (Pet. 7 n.6). The court issued its Memorandum and Opinion on July 27, 1979 (the "order") (Pet.App. 29a).

Of the six documents at issue here, five (Nos. 3, 7, 14, 15, and 20) had been released to respondent by the CIA with substantial deletions and one (No. 21) had been withheld in its entirety. The district court sustained the bulk of these withholdings but ordered what appears to be a small amount of additional disclosure as follows:[6]

---

[5]Rule 1-9(d) of the United States District Court for the District of Columbia is entitled "OPPOSING POINTS AND AUTHORITIES" and provides:

> Within ten days of the date of service or such other time as the court may direct, an opposing party shall serve and file a statement of points and authorities in opposition to the motion, together with a proposed order. If such opposing statement is not filed within the prescribed time, the court may treat the motion as conceded.

[6]Respondent cannot gauge the extent of the disclosure order as to documents Nos. 14 and 21 because the order refers to markings on the *in camera* version of these documents. Respondent has not seen the *in camera* version of document No. 14 and has never seen any version of document No. 21.

| | |
|---|---|
| Doc. No. 3 (1965, 1 page): | ¶ All but the first word.<br>¶ 4: From "stated that . . ." (line 20) to end of paragraph, deleting all identifying names. |
| Doc. No. 7 (1975, 5 pages): | p.1, ¶ 1: From "and to maintain . . ." (line 9) to ". . . government officials" (line 11).<br>p.2, ¶ 2: From "During a . . ." (line 16) to<br>p.2, ¶ 3: ". . defense circles" (line 9). |
| Doc. No. 14 (1976, 10 pages): | pp. 2-10: Entire body of text except for portions within brackets ([]) as marked on *in camera* submission. |
| Doc. No. 15 (1976, 1 page): | ¶ 21: Last sentence. |
| Doc. No. 20 (1977, 11 pages): | p.1, ¶ 1: All material claimed under privacy exemption ("L") up through p.3, ¶ 3 (line 16).<br>p. 4, ¶ 4: Entire paragraph, except for last sentence. |
| Doc. No. 21 (1976, 10 pages): | pp.1-10: Entire body of text except for portions within double brackets ([]) as marked on *in camera* submission. |

(Pet.App. 35a).

After receipt of the order of July 27, 1979, the CIA moved for partial relief from the judgment pursuant to Fed.R.Civ.P. 60(b)(6). The motion was accompanied by a supplemental affidavit of Robert Owen and a supplemental index. By this submission, the CIA offered to change

its defense for document 20 from Exemption 6 to Exemptions 1 and 3 and offered to submit *in camera, ex parte* testimony in support of the exemptions claimed as to all six documents (C.A. 124-125, 129). The motion was opposed by respondent and denied by the district court (Pet.App. 39a).

The court of appeals affirmed the district court's order of disclosure and its rejection of the CIA's offer of post-judgment, *in camera, ex parte* testimony (Pet.App. 13a-19a). Disclosure of the portions of the six documents under consideration has been stayed since September, 1979 (Pet.App. 39a, 41a, 42a).

## SUMMARY OF ARGUMENT

The CIA asks this Court to relieve it from the consequences of its remiss presentation of its case in the district court or to interpret the Freedom of Information Act in a manner which the Congress has purposefully rejected. Neither is a sufficient reason for granting the petition.

## ARGUMENT

1. There is no need to belabor the basic principles of FOIA litigation. The Act requires the fullest possible disclosure of information in recognition of the democratic precept that government and the information of government belong to the people; the enumerated exemptions from disclosure are construed narrowly with the burden of proof upon the agency; and an agency's claim of exemption is subject to *de novo* judicial review. *Vaughn v. Rosen,* 484 F.2d 820 (1973), *cert. denied,* 415 U.S. 977 (1974); 5 U.S.C. § 552(a)(4)(B) (1976).

In reviewing claims of exemption for national security reasons, the *de novo* standard of review applies with the

caveat that the district court must accord substantial weight to the agency's public affidavits because of the expertise of the Executive branch in the area of national security. However, when the public materials are inadequate for the trial court's reasoned *de novo* determination, the court may examine the documents *in camera*. *E.g.*, *Lesar v. United States Department of Justice*, 636 F.2d 472 (D.C.Cir. 1980); *Hayden v. National Security Agency/Central Security Service*, 608 F.2d 1381, (D.C.Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Weissman v. Central Intelligence Agency*, 565 F.2d 692 (D.C.Cir. 1977).

2. The CIA argues in this Court that its public affidavit/index was sufficient unto its purpose and that the district court should not have examined the documents *in camera* (Pet. 12, 15-20). That position is entirely foreclosed to the CIA. It is legislatively foreclosed by the Act itself, which was specifically amended by Congress in 1974 to grant reviewing courts discretion to employ *in camera* inspection as to all categories of exemption, including Exemptions 1 and 3. 5 U.S.C. § 552(a)(4)(B) (1976).[7] It is substantively foreclosed by the CIA's own numerous representations to the contrary made in its briefs and arguments in the court of appeals.[7] It is procedurally

---

[7]The CIA's reply brief (at 6) states: "The CIA has no complaint with the court's decision to view the disputed documents *in camera* (CIA Br. p. 22 n.26)." That disclaimer was repeated at argument:

> [Counsel for CIA]: That is correct. Congress didn't intend that in every case there would be *in camera* inspection.
>
> [The Court]: But the judge has the discretion to do so?
>
> [Counsel for CIA]: *Clearly. We don't challenge the fact that he did it in this case.*

*(Sept. 9, 1980 Tr. at 24) (emphasis added).*

foreclosed by the CIA's failure to oppose the cross motion for summary judgment which requested an *in camera* review of the documents.

More importantly, the position that the court need not have examined the documents is foreclosed to the CIA on the merits. Both lower courts found that the CIA's presentation was "of a general nature" and contained "broad, often conclusory claims in the area of national security." (Pet.App. 15a, 30a). Indeed, the presentation was so general that large portions of the Owen affidavit appeared verbatim in the simultaneously filed affidavit of CIA employee Gambino (*Compare* C.A. 20-24, 27-28, 31-32 and 35-36 *with* C.A. 85-93). Also, the anonymous author of the index admitted to difficulty in describing the information withheld without undermining the claims of exemption (C.A. 38); that admission virtually compelled an *in camera* inspection. *See Allen v. Central Intelligence Agency* 636 F.2d 1287, 1299 (D.C.Cir. 1980) ("[t]he CIA thus argues that to require greater specificity in its affidavits would result in disclosure of the information sought to be protected. The only way to escape this dilemma involves use of *in camera* inspection").

The district court fully recognized the applicability of the substantial weight standard to the CIA's affidavit/index and fully recognized that the issue of national security is "particularly sensitive" (Pet.App. 30a-31a). It stated, however, "[a]s the public record here is not sufficient to permit a responsible determination, the Court has exercised its sound discretion to conduct a thorough, *in camera* examination." (Pet.App. 31a) (citations omitted). Significantly, the district judge in this case (Gesell, J.) has made clear that *in camera* inspection of documents in national security cases should be used as a last resort and should be undertaken "sparingly and only

where clear necessity is shown". *Klaus v. Blake,* 428 F.Supp. 37, 38 (D.D.C. 1976). *See also Weissman v. Central Intelligence Agency,* 565 F.2d 692, 697 (D.C.Cir. 1977) (sitting by designation pursuant to 28 U.S.C. § 292(a)); *Military Audit Project v. Bush,* 418 F.Supp. 876, 879 (D.D.C. 1976).

Thus, this is a clear case where the district court simply exercised an unobjected-to discretion to examine the documents. It did so with the cooperation and consent of the CIA and it did so with full regard for the substantial weight standard and for the sensitivity of the CIA's national security claims. It was a proper exercise of the court's discretion and, for lack of any objection in the courts below, is unreviewable at this juncture.

3. The district court, as noted earlier, reviewed 103 documents and ordered disclosure of what appear to be snippets of six. The basis for the disclosure order was that the CIA's claims were "overly broad" — or, put another way, that the documents did not altogether live up to their advance billing in the affidavit/index. We do not understand the CIA to dispute this. Rather, the CIA contends that the court need not have viewed the documents or, alternatively, that having viewed the documents and having determined to order partial disclosure, the court was then obligated to give the CIA another chance to prove its claims of exemption. Having previously discussed the first of these contentions, we turn to the second.

The CIA specifically suggests that the district court, having perceived that the CIA presentation was insufficient, should have refrained from deciding the case because it "was obligated to afford the CIA a . . . [renewed] opportunity to make an *in camera* submission . . . ." (Pet. 12). This is an odd contention in light of the CIA's initial posi-

tion that *in camera* inspection was inappropriate, And, it is at odds with the adversarial nature of the proceeding and with the neutrality of the judiciary.

Litigation under the Freedom of Information Act strains traditional concepts of the adversary system. The disadvantage lies with the plaintiff because the subject matter of the litigation is secret from it, yet fully known to the defendant. The CIA proposes that the scales should be tipped even further in favor of the defendant — it proposes to obligate the district court, before ruling, to advise the defendant as to the deficiencies in its case and to invite remedy of those deficiencies. This would violate the court's oath of impartiality, 28 U.S.C. § 453, and is entirely repugnant to the adversary system. As Judge Gesell has stated in another Freedom of Information Act case raising national security issues:

> Is it not alien to our entire jurisprudence that courts are to function *ex parte* in private without benefit of the adversary process? Will it not degrade the judiciary if it is used as a mechanism for resolving statutory rights on the basis of undisclosed representations made in chambers to judges by parties having a direct personal interest in the outcome? . . . The adversary system is a well-tested safeguard for preserving the integrity of the judicial process. It is the duty of a judge wherever possible to resolve rights of citizens upon facts and arguments that are presented in an adversary context exposed to public view with all the protections fair hearing and due process provide.

*Military Audit Project v. Bush*, 418 F.Supp. 876, 878 (D.D.C. 1976).

The inescapable soundness of Judge Gesell's analysis is clearly shown by the CIA's reasons for demanding such special treatment. The CIA contends here: (1) that it "could not know that the court would regard its . . . [summary judgment presentation] as inadequate" (Pet. 20); and (2) that it "could not know that if the district court denied . . . [its] motion for summary judgment, it would at the same time grant summary judgment in favor of respondent." (Pet. 21). Indeed, in support of its theory that it was entitled to successive opportunities to meet its burden of proof, the CIA complains that FOIA litigation is a "speculative undertaking" (Pet. 22).

This requires an equally simplistic response. No litigation is risk-free, and no litigant is entitled to withhold evidence for subsequent seriatim presentations if the court's decision is adverse. Here, the "surprises" of which the CIA complains were perfectly foreseeable and easily protected against. The risk that the district court would regard the CIA's affidavit/index as insufficient was plain: the CIA *knew* that respondent had opposed the motion for summary judgment on that very ground; the CIA *knew* (as respondent did not) that the court had personally compared the documents with the affidavit/index; and the CIA *knew* (as respondent and the court did not) that it had chosen to withhold information arguably in support of its position.[8]

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[8] "[T]he publicly filed materials did not present all the information that the CIA had in its possession . . . ." (Pet. 21). If the CIA believed that it could not be more specific in its public affidavit/index, it could easily have employed the commonplace solution of filing with its public materials a request to present further information *in camera*. For example, in *Hayden v. N.S.A.*, *supra*, 608 F.2d at 1383, the court noted that the agency filed "a request to file classified affidavits *in camera*, claiming that further justification would require the use of evidence which was itself classified and sensitive."

Equally disingenuous is the CIA's position that it could not know that denial of its motion for summary judgment would result in an order of disclosure. The case was submitted on cross motions for summary judgment – that is, both parties represented that the controversy was ripe for judicial determination. Moreover, FOIA cases seldom proceed to discovery or trial; they are entirely disposed of by summary judgment because, as here, the questions presented are largely questions of law and, once these are resolved, there is nothing further to be done.

In short, it was the obligation of the CIA, as a litigant, to meet its statutory burden of proof in the district court and to do so in a manner which, consistent with the adversary system, allowed respondent an opportunity, however limited, to participate. The court was not obligated to align itself with the CIA to ensure that the CIA's presentation succeeded. Allegations of national security do not justify reversal of the basic duty of the court to uphold the adversary system and the impartiality of the judiciary.

4. Whether a district court may have abused its discretion in deciding to review documents *in camera* and whether a district court may have abused its discretion in denying relief under Fed.R.Civ.P. 60(b)(6) are issues not generally within this Court's Rule 17 consideration governing review on certiorari.

The argument for granting the writ of certiorari comes down to the fact that this case involves Exemptions 1 and 3 of the Freedom of Information Act. However, there is nothing talismanic about Exemptions 1 and 3. Congress has made unmistakably clear – to the point of legislatively overruling a decision of this Court and to the point of

overriding a presidential veto[9] – that an agency's claim of exemption for national security reasons is subject to *de*

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[9]As originally enacted in 1966, Exemption 1 covered information "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1970). In *E.P.A. v. Mink*, 410 U.S. 73 (1973), this Court held that the original Exemption 1 allowed neither substantive challenge to an agency's decision to classify information nor *in camera* inspection of the information withheld. In response, the 1974 Amendments authorized *in camera* inspection as to all categories of exemption and revised Exemption 1 to its present language authorizing review of the substantive as well as procedural propriety of classification. Both changes were "aimed at increasing the authority of the courts to engage in a full review of agency action with respect to information classified . . . under Executive order authority." (Source Book at 127).

In so amending the Act in 1974 over presidential veto, Congress specifically rejected the administration's proposal for a "reasonable basis" standard of review in national security cases that would be less rigorous than *de novo* review. The case for *de novo* review was summarized by Senator Baker (R-Tenn.) in the debate concerning whether to override the veto:

> In short, recent experience indicates that the Federal Government exhibits a proclivity for overclassification of information, especially that which is embarrassing or incriminating; and I believe that this trend would continue if judicial review of classified documents applied a presumption of validity to the classification as recommended by the President. De novo judicial determination based on in camera inspection of classified documents – as provided by the Freedom of Information Act amendments passed by the Congress – insures confidentiality for genuine military, intelligence, and foreign policy information while allowing citizens, scholars, and perhaps even Congress access to information which should be in the public domain.
>
> In balancing the minimal risks that a Federal judge might disclose legitimate national security information against the potential for mischief and criminal activity under the cloak of secrecy, I must conclude that a fully informed citizenry provides the most secure protection for democracy.

Source Book at 460-461.

*novo* review, with substantial deference to be accorded to the agency's affidavits. In explicitly rejecting a less rigorous standard of review for national security claims, Congress expressed its confidence in the trustworthiness and common sense of the federal judiciary and, at the same time, expressed its concern that the Executive branch classifies information which properly belongs to the citizenry – perhaps to the extent that 95 percent of classified information should be declassified.[10]

In adhering to the *de novo* standard of review for national security claims, Congress fully expected that the federal courts would recognize the Executive branch expertise in the area of national security, would accord

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[10]During the debate concerning whether to override the veto, Sen. Baker (R-Tenn.) stated:

> During my tenure as a member of the Senate Select Committee on Presidential Campaign Activities, I reviewed literally hundreds of Watergate-related documents that had been classified "secret" or "top secret" or the like. It is my opinion that at least 95% of these documents should not have been classified in the first place and that the Nation's security and foreign policy would not be damaged in any way by public disclosure of these documents.

Source Book at 460.

In the same year, former Justice and former Ambassador Goldberg testified, "I have read and prepared countless thousands of classified documents. In my experience, 75% of these documents should never have been classified in the first place; another 15% quickly outlived the need for secrecy; and only about 10% genuinely required restricted access over any significant period of time." United States Government Information Policies and Practices – The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92nd Cong., 1st Sess. Part I at 12.

"substantial weight" to the agency's submission[11] and would, in the vast majority of cases, sustain the agency's decision to withhold. And that is precisely what has happened. The remarkable fact of this case is not that the CIA has been ordered to disclose a small amount of erroneously classified information, but that such orders have not been more commonly entered since the 1974 Amendments clarified the authority of the federal courts to do so.[12]

Thus, the standard of review for national security claims under the FOIA is clear. Congress has spoken. If the CIA's concern is with the wisdom of that standard, the proper forum for redress is the Congress and not this Court. Indeed, at the behest of the Department of Justice, Congress is now in the process of reviewing that standard and is contemplating a revision which would eliminate *de novo* review in national security cases in favor of upholding the agency's action unless it is arbitrary or capricious.[13]

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[11] However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in § 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Source Book at 229 (Conference Committee Report).

[12] Indeed, although the Congressional directive of deference was given in the context of the 1974 Amendments to Exemption 1, the courts have heeded it in adjudicating national security claims arising under Exemption 3 as well. *Halperin v. C.I.A.*, 629 F.2d 144, 148 (D.C. Cir. 1980).

[13] The proposed amendments were introduced by Subcommittee Chairman Hatch (R-Utah) and identified as "the Reagan administration's proposed amendments to the Freedom of Information Act. This

(footnote continued on page 16)

The thrust of the CIA's argument is that, simply because the CIA "lost" this case, the only conclusion to be drawn is that the lower courts failed to accord the utmost deference to the Executive branch in national security matters and, therefore, misapplied the existing standard of review.[14] However, the result reached is perfectly consistent with the conclusion that the information was so misclassified that, even with the required deference, the agency's presentation fell short. Indeed, any standard of review other than rubberstamp approval of the agency determination admits of the possibility that the reviewing court will adjudge the claim of exemption differently than did the agency. That possibility would exist if Congress had adopted the "reasonable basis" standard of review urged by Presidents Nixon and Ford in 1974 and will exist if Congress adopts the "not arbitrary or capricious" standard now under consideration. The possibility of judicially-ordered disclosure exists because the possibility exists — and materialized in this case — that the agency has overclassified information.

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proposal is a part of the Department of Justice's legislative program for the 97th Congress." 127 Cong. Rec. S11702. The proposed amendments (S. 1730) have been reported out of the Subcommittee on the Constitution of the Senate Committee on the Judiciary.

Sen. Hatch explained the proposed change in the standard of review: "[a] change to the traditional Administrative Procedure Act standard of review for arbitrary or capricious action from the present *de novo* standard would be more consistent with the courts' need to give "substantial weight" to an agency's expertise." 127 Cong. Rec. S11708.

[14]The "constitutional question" hinted at by the CIA (Pet. 23) was neither briefed nor argued nor decided in the courts below and is therefore beyond the pale of certiorari. Moreover, the CIA's constitutional concerns seem peculiarly result-oriented: its position is that the existing standard does not infringe on Executive prerogative and is properly applied so long as it results in summary judgment for the government.

## CONCLUSION

The district court thoroughly reviewed the CIA's claims of exemption, gave the full measure of deference to those claims and, in the interest of responsible *de novo* review, compared, first-hand, those claims with the documents at issue. Having examined the documents, the court held that, in minor aspect, the claims of exemption were overbroad. Subsequently, the court rejected the CIA's offer to upgrade its presentation *in camera*. These rulings were affirmed on appeal. Nothing in this situation creates a special or important reason for granting the writ of certiorari. Petitioner's philosophical reservations as to the advisability of the *de novo* standard of review for national security claims and as to the usefulness of the adversary system in resolving those claims are inappropriate for determination here and invite legislative rather than judicial action. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this brief in opposition were mailed postage prepaid on January 13, 1982 to the Solicitor General, United States Department of Justice, Washington, D.C. 20530

Dorothy Sellers

# Petitioner's Reply Brief

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No. 81-1098

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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CENTRAL INTELLIGENCE AGENCY AND WILLIAM J. CASEY, PETITIONERS

*v.*

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONERS

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1. The court of appeals has taken the unprecedented step of ordering public disclosure of a number of classified documents that the CIA withheld on national security grounds. The CIA refused to release these documents because they could enable a knowledgeable reader to identify confidential intelligence sources or would disclose confidential information obtained as a result of a liaison relationship with a foreign intelligence or security service. See Pet. 3-6. Respondent attempts to trivialize the significance of this decision by characterizing the matter ordered disclosed as mere "snippets" of information. Br. in Opp. 9; see also *id.* at 4, 15, 17. This characterization

is factually incorrect: entire paragraphs have been ordered released. See Pet. App. 35a; Br. in Opp. 5.

In any event, respondent's focus on the number of words ordered disclosed obviously misses the point. Surely, in order to preserve the confidentiality of an intelligence source the CIA could withhold the source's name, even if it constituted only a word or two in an extensive document. The same principle applies here, where the CIA has withheld portions of documents that contain information which could enable a knowledgeable reader to deduce the identity of an intelligence source, even though the source's name is not expressly mentioned.

2. Respondent's other arguments likewise reflect an effort to divert attention from the cavalier manner in which the courts below disposed of a case raising serious national security concerns. For example, respondent devotes considerable discussion (Pet. 7-9) to a procedural issue that the CIA has not raised as a basis for reversing the judgment below—whether the district court erred in reviewing the documents *in camera*. It is true, of course, that we argue in our certiorari petition (at 15-18) that the affidavits and indices were more than adequate, standing alone, to support the withholding. The established rule is that "if the description in the affidavits demonstrates that the information logically falls within the claimed exemption and if the information is neither controverted by contrary evidence in the record nor by evidence of agency bad faith, then summary judgment for the Government is warranted" without an *in camera* review of the documents. *Baez* v. *United States Department of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980); see also *Stein* v. *Department of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981); *Bell* v. *United States*, 563 F.2d 484, 487 (1st Cir. 1977). This standard was satisfied here, because the affidavits and document indices demonstrated that the information "logically falls" within Exemptions 1 and 3, 5 U.S.C. 552(b)(1) and (3).

However, the legislative history indicates that the decision whether to review documents *in camera* is largely within the discretion of the district court. H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 9 (1974). For this reason, and because the district court already had reviewed the documents in any event, the government has not taken issue with the district court's decision to review the documents *in camera*, even though the government has contended that the affidavits and indices were adequate to support withholding. See Pet. 18; Ct. App. Br. 22-24 & n.26; Ct. App. Reply Br. 3-6; Petition for Rehearing 7-11 & n.7.

Respondent seems to believe, however, that the CIA's affidavits and indices explaining the basis for withholding are irrelevant if the CIA does not challenge the district court's decision to review the documents themselves *in camera*. This assumption is plainly incorrect. The affidavits and indices were not submitted on only the narrow procedural question of whether the district court should review the documents *in camera*, thereby permitting the court to disregard those materials once it decided to examine the documents themselves. The affidavits and indices go to the merits of whether the documents were properly withheld on national security grounds. They remained part of the record in the case and therefore had to be considered in ruling on the motions for summary judgment even after the court examined the documents *in camera*. See Fed. R. Civ. P. 56(c).[1]

Moreover, it is to the Director of Central Intelligence, not to the courts, that Congress has assigned the responsibility to take measures necessary to protect intelligence sources and methods from unauthorized disclosure. 50 U.S.C. 403(d)(3). In making a determination whether

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[1] Rule 56(c) provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

materials should be withheld under Exemptions 1 and 3 on this ground, the CIA must consider far more than what appears on the face of the documents themselves. It also must consider: (1) the circumstances surrounding the gathering of the information contained in the documents; (2) what other information already might be in the possession of a knowledgeable reader; (3) the likelihood, based on the CIA's accumulated expertise, that the reader might be able to draw a connection between the information in the documents and an intelligence source; and (4) how much damage would result to the national security from identification of the source.

The district court's examination of the documents alone ordinarily would not enable it to assess these additional factors that must be weighed by the CIA, as was explained in the CIA's supplemental submission in this case. C.A. App. 122-125.[2] Consequently, when a judge "relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful." *Snepp* v. *United States*, 444 U.S. 507, 512 (1980). It is for this reason that the district court was required, even after examining the documents, to give the CIA's affidavits and document disposition indices the "substantial weight" that Congress intended to be accorded an agency's representations in national security cases. See H.R. Conf. Rep. No. 93-1380, *supra*, at 12; Pet. 18-19, 22-23. Yet the district court, after reviewing the documents alone, ordered disclosure on the basis of the bare conclusion that the CIA's claims of exemption were "overly broad" (Pet. App. 35a),[3] without explaining why

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[2] "C.A. App." refers to the Joint Appendix in the court of appeals.

[3] Respondent states (Br. in Opp. 9) that it does not understand the CIA to dispute the district court's conclusion that the CIA's claims of exemption for the documents in question were "overly broad." Based on this assumption, respondent suggests (Br. in

it disagreed with the CIA's assessment of the risks of disclosure. And it denied without discussion the CIA's motion to make an *in camera* submission to make clear the context in which the information was gathered and the reasons why the release of information that might have appeared innocuous to the district court would be detrimental to the national security (*id.* at 39a).

The court of appeals' disposition of the case was equally inadequate. Remarkably, it did not even address the merits of the district court's rejection of the CIA's national security claims of exemption for the six documents at issue here; it instead treated the case as if it raised only technical procedural issues. The court did not, for example, examine the documents it ordered released, and it considered the sufficiency of the CIA's affidavits and indices only in concluding that the district court had not abused its discretion in examining the documents *in camera* (Pet. App. 14a-16a), even though the CIA had made abundantly clear that it was not relying on the district court's examination of the documents as an independent ground for reversal (see page 3, *supra*).

In addition, although the court of appeals acknowledged that the district court should have given a "full explanation" of its rulings on exemptions and its disclosure order (Pet. App. 17a), the court declined to remand for such an explanation—this despite the national security concerns raised in this case and the distinct possibility that the

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Opp. 9-12) that the CIA's sole contention is that the district court erred in not permitting the CIA to submit *additional* materials to support withholding after the district court ordered release. Respondent is simply wrong. The CIA has contended throughout that withholding should have been sustained on the basis of the public materials and the court's review of the documents, without any need to consider an *in camera* submission. See Pet. 15-20; Ct. App. Br. 22-26. Of course, as to document 20, the CIA's assertion of Exemptions 1 and 3 was made in the motion for relief from judgment, after a fresh review of the document indicated that release could lead to the identification of an intelligence source (C.A. App. 121-122, 129).

district court had not fully comprehended the CIA's rationale for withholding. Finally, the court of appeals concluded that even though an *in camera* submission might have been "helpful and appropriate here," the district court did not abuse its discretion in declining to entertain it because the "interests of judicial economy and finality" militated against doing so (*id.* at 18a). The court did not consider the national security interests that manifestly militated to the contrary, in order to avoid the " 'intolerable [result] that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.' " *United States* v. *Nixon*, 418 U.S. 683, 710 (1974), quoting *C. & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Such a casual approach does not comport with the constitutional requirement that courts accord the "utmost deference" to the Executive with respect to the need for secrecy of information pertaining to the national security. *United States* v. *Nixon*, *supra*, 418 U.S. at 710.[4] Respondent's attempt to portray the decision below as a routine FOIA case raising only technical procedural issues therefore is entirely unavailing.

3. Respondent attempts (Br. in Opp. 9-12) to defend the district court's refusal to afford the CIA an opportunity to make an *in camera* submission before ordering release of the documents in question by suggesting that the parties, when they filed cross-motions for summary judgment, in effect represented to the court that the case was ripe for judicial determination and that the CIA's subsequent offer to submit *in camera* testimony therefore came too late. This contention is in error.

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[4] Contrary to respondent's assertion (Br. in Opp. 16 n.14), the CIA fully briefed in the court of appeals the constitutional underpinnings of the requirement in FOIA national security cases that courts give substantial weight to the judgment of the agencies Congress has charged with protecting classified information and intelligence sources and methods. See Ct. App. Br. 15-21.

It is well-settled that the mere filing of cross-motions for summary judgment does not warrant the court's granting of summary judgment for either party unless that party is entitled to judgment as a matter of law upon facts that are not genuinely disputed. See, *e.g.*, 6 *Moore's Federal Practice* ¶ 56.13, at 56-341 (2d ed. 1981). Even though the agency bears the ultimate burden in an FOIA suit of proving that the documents are covered by an exemption (see 5 U.S.C. 552(a)(4)(B)), when the plaintiff in an FOIA suit moves for summary judgment, he bears the burden of showing that the facts that would entitle him to judgment as a matter of law are undisputed. 6 *Moore's Federal Practice*, *supra*, at 56-344 to 56-345; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 153, 157 (1970); see *National Association of Government Employes* v. *Campbell*, 593 F.2d 1023, 1027-1029 (D.C. Cir. 1978); *Coastal States Gas Corp.* v. *Department of Energy*, 644 F.2d 969, 978-980 (3d Cir. 1981); *Irons* v. *Bell*, 596 F.2d 468, 471-472 n.6 (1st Cir. 1979).

In this case, the CIA moved for summary judgment on the ground that the publicly filed affidavits and accompanying indices, which were uncontradicted by respondent, carried its burden of proving that the documents fell within the exemptions claimed, entitling it to judgment as a matter of law.[5] Respondent's one-paragraph cross-motion for summary judgment simply incorporated its memorandum in opposition to the CIA's motion for summary judgment, in which respondent argued that the CIA's affidavits and document disposition indices were insufficient to support withholding.[6] It was not accompanied by any supporting affidavits or other undisputed evidence showing that the documents were *not* covered by

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[5] See Memorandum in Support of Defendants' Motion for Summary Judgment, filed May 16, 1979.

[6] See Plaintiff's Motion for Summary Judgment, filed June 25, 1979; Memorandum in Opposition to Defendants' Motion for Summary Judgment, filed June 25, 1979.

the exemptions claimed and that *respondent* therefore was entitled to judgment as a matter of law. Accordingly, even assuming, contrary to our submission above, that respondent was correct that the CIA had not yet made a sufficient showing to support a grant of summary judgment in its favor on the basis of the publicly filed materials alone, this did not warrant an award of summary judgment in respondent's favor at that stage. For this reason, respondent errs in relying upon summary judgment principles in contending that the district court properly rejected the CIA's offer to make an additional *in camera* submission after the court denied the CIA's motion for summary judgment on the basis of the publicly filed materials.[7]

Respondent also seeks to defend the decision below on this point by arguing (Br. in Opp. 10-11) that to allow an *in camera*, *ex parte* submission by an agency in support of withholding strains the adversary system. But Congress contemplated that such submissions would be necessary in certain FOIA cases, especially those presenting national security concerns. S. Rep. No. 93-854, 93d Cong., 2d Sess. 15-16 (1974). The United States, as sovereign, is immune from suit except as it consents to be sued, and the terms of its consent necessarily control the rights of the parties in litigation against the government. See, *e.g.*, *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 4. *In camera* proceedings, when necessary in order to

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[7] For the same reasons, respondent also errs in suggesting (Br. in Opp. 10) that to require a district court to afford the agency an opportunity to make an *in camera* submission before ordering disclosure would be to "tip the scales" unfairly in favor of the government and undermine the impartiality of the court. Where, as here, the agency's affidavits and accompanying indices at the very least show that there is a genuine issue of material fact as to whether documents are properly withheld, it is the application of Rule 56(c) of the Rules of Civil Procedure—which applies equally to the government and to other parties and in Freedom of Information Act suits as in other cases—that requires the plaintiff's motion for summary judgment to be denied.

permit the agency to make a full presentation in support of withholding, are but an aspect of the statutory FOIA cause of action Congress has created.

For the foregoing reasons and the additional reasons stated in the certiorari petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.[8]

REX E. LEE
*Solicitor General*

FEBRUARY 1982

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[8] We will, of course, make the documents in question available to the Court should the Court wish to review them, either in connection with ruling on the petition or, if certiorari is granted, in ruling on the merits.

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